

DEPARTMENT OF HEALTH**NOTICE OF EMERGENCY AND PROPOSED RULEMAKING**

The Director of the Department of Health, pursuant to the authority set forth in An Act to enable the District of Columbia to receive Federal financial assistance under Title XIX of the Social Security Act for a medical assistance program, and for other purposes, approved December 27, 1967 (81 Stat. 774; D.C. Official Code § 1-307.02), Reorganization Plan No. 4 of 1996, and Mayor's Order 97-42, dated February 18, 1997, hereby gives notice of the adoption, on an emergency basis, of an amendment to section 926 of Chapter 9 of Title 29 of the District of Columbia Municipal Regulations (DCMR), entitled "Environmental Accessibility Adaptation Services." These rules establish standards governing reimbursement by the District of Columbia Medicaid Program for environmental accessibility adaptation ("EAA") services provided by qualified building professionals to participants with mental retardation and developmental disabilities in the Home and Community-based Services Waiver for Persons with Mental Retardation and Developmental Disabilities (Waiver).

This rulemaking amends the previously published rules on August 22, 2003 (50 DCR 6989) by defining clear limits on EAA service. The previous lifetime limit of \$10,000 per participant for EAA changed to a limit of \$10,000 in expenditures on EAA services over a five-year period per participant and to no more than two residences in the five-year period.

Emergency action is necessary for the immediate preservation of the health, safety, and welfare of Waiver participants who are in need of EAA services. These emergency rules are needed so that, on the effective date of the Waiver as modified, there will be rules in place consistent with the provisions of the Waiver as modified to limit EAA services to \$10,000 in expenditures over a five-year period per participant and to no more than two residences in the five-year period.

The District of Columbia Medicaid Program is also modifying the Waiver to reflect these changes. The Council of the District of Columbia has approved the corresponding Waiver. The U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services have also approved the corresponding Waiver with an effective date of November 20, 2007. The emergency rulemaking was adopted on November 19, 2007, and will become effective on November 20, 2007. The emergency rules will remain in effect for 120 days or until March 18, 2008, unless superseded by publication of a Notice of Final Rulemaking in the *D.C. Register*, whichever comes first.

The Director also gives notice of the intent to take final rulemaking action to adopt these proposed rules not less than thirty (30) days from the date of publication of this notice in the *D.C. Register*.

Section 926 (Environmental Accessibility Adaptation Services) of Chapter 9 of Title 29 DCMR is deleted in its entirety and amended to read as follows:

926 ENVIRONMENTAL ACCESSIBILITY ADAPTATION SERVICES

926.1 Environmental accessibility adaptation (EAA) services shall be reimbursed by the District of Columbia Medicaid Program for each participant with mental retardation and developmental disabilities in the Home and Community-based Waiver for Persons with Mental Retardation and Developmental Disabilities (Waiver) subject to the requirements set forth in this section.

926.2 EAA services are physical adaptations to a home, required by a person's Individual Habilitation Plan (IHP) or Individual Support Plan (ISP) and Plan of Care that are necessary to ensure the health, welfare, and safety of a person, or that enable a person to live with greater independence in the home, and without which the person would require institutionalization. EAA services shall be intended to cover the difference between construction or renovation costs to make the home accessible and not to cover basic construction or renovation costs. For example, EAA services shall be intended to cover the costs associated with construction or renovation work under subsections 926.3(a)(b)(d) and (e), but may not cover all of the costs associated with construction or renovation work under subsection 926.3(c).

926.3 EAA services may include:

- (a) Installing ramps and grab-bars;
- (b) Widening doorways;
- (c) Modifying bathroom facilities;
- (d) Installing lift systems; and
- (e) Installing specialized electric and plumbing systems that are necessary to accommodate medical equipment and supplies.

926.4 EAA services shall:

- (a) Be necessary to ensure the health, welfare, or safety of the person and enable the person to function with greater independence; and
- (b) Not be provided or reimbursed for persons eligible for the Department of Housing and Community Development, Handicap Accessibility Improvement Program.

926.5 To be eligible for reimbursement, EAA services shall be:

- (a) Pre-authorized by the Department on Disability Services (DDS);
- (b) Installed in one of the following:
 - (1) The person's own home;
 - (2) The home of the person's family, guardian, or other primary caretaker who is not providing Residential Habilitation Services under the Waiver;
 - (3) A foster home in which the person resides;
 - (4) An apartment or other rental property in which the person resides, provided that the participant obtains the property owner's written consent prior to making environmental accessibility adaptations; or
 - (5) A Supported Living residence as defined in Section 993 (Supported Living Services) of Title 29 DCMR.

926.6 EAA services shall not include carpeting, roof repair, central air conditioning, exterior fencing, general repair or maintenance, or those adaptations or improvements to the home that are of general utility; make no direct medical or remedial benefit to the person; and shall not include adaptations that increase the total square footage of the home.

926.7 A DDS case manager shall assist all eligible persons to gain access to the Department of Housing and Community Development, Handicap Accessibility Improvement Program.

926.8 EAA services shall be authorized by the interdisciplinary team and provided in accordance with the person's IHP or ISP and Plan of Care

926.9 Each provider of EAA services shall:

- (a) Be a non-profit organization, home health agency, social service agency, or other business entity;
- (b) Have a current District of Columbia Medicaid Provider Agreement that authorizes the provider to bill for EAA services under the Waiver; and
- (c) Comply with applicable contractor licensing requirements in the District of Columbia or in the jurisdiction where EAA services are provided.

926.10 Before approving EAA services, except for installation of pre-fabricated ramps for wheel-chair accessibility, an evaluation or home inspection shall be required from a licensed contractor or Certified Third Party Construction Inspector that:

- (a) Establishes that the home is structurally sound;

- (b) Determines whether the home can accommodate the EAA services;
 - (c) Identifies any construction stipulations; and
 - (d) Recommends how the EAA should be constructed.
- 926.11 EAA services shall be provided consistent with any stipulations or recommendations from the licensed contractor or Certified Third Party Construction Inspector.
- 926.12 EAA services shall be provided in accordance with the applicable District, state or local building codes.
- 926.13 Reimbursement for EAA services shall be limited to ten thousand dollars (\$10,000) per participant over a five-year period and shall be limited to modifications not to exceed two (2) residences in a five-year period. Exceptions to the five-year limitations in this section on EAA services may be approved by DDS on a case by case basis, with adequate supporting documentation outlined in section 926.14, based on demonstrated need, but shall be pre-authorized.
- 926.14 Evaluation or home inspection shall be reimbursed at a rate not to exceed five hundred dollars (\$500) per inspection, but shall only be payable as a separate service if the home is found structurally unsound or otherwise inappropriate for the EEA modification requested. Reimbursement of all other EAA services shall require:
- (a) Written documentation of the building inspection;
 - (b) Development of a construction plan;
 - (c) Acquisition of permits;
 - (d) Purchase of materials; and
 - (e) Labor for construction, renovation, or installation services to be provided.

926.99 DEFINITIONS

When used in this section, the following terms and phrases shall have the meanings ascribed:

Certified Third Party Construction Inspector – an inspector certified under the District of Columbia Department of Consumer and Regulatory Affairs Third Party Inspector program.

Individual Habilitation Plan (IHP) – That plan as set forth in section 403 of the Mentally Retarded Citizens Constitutional Rights and Dignity Act of 1978, effective

March 3, 1979 (D.C. Law 2-137; D.C. Official Code § 7-1304.03).

Individual Support Plan (ISP) – The successor to the individual habilitation plan (IHP) as defined in the 2001 Plan for Compliance and Conclusion of *Evans v. Williams*.

Licensed Contractor – a contractor licensed to do business in the District of Columbia by the District of Columbia Department of Consumer and Regulatory Affairs, or licensed to do business in the jurisdiction in which the environmental accessibility adaptation services are to be provided.

Person – An individual with intellectual and developmental disabilities who has been determined eligible to receive services under the Home and Community-based Services Waiver for Persons with Mental Retardation and Developmental Disabilities (Waiver).

Plan of Care – A written service plan that meets the requirements set forth in section 1904.4 of Title 29 DCMR, is signed by the person receiving services, and is used to pre-authorize Waiver services.

Waiver – Shall mean the Home and Community-based Waiver for Persons with Mental Retardation and Developmental Disabilities as approved by the Council of the District of Columbia (Council) and the U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), as may be further amended and approved by the Council and CMS.

Comments on the proposed rules shall be submitted in writing to Robert T. Maruca, Senior Deputy Director, Medical Assistance Administration, Department of Health, 825 North Capitol Street, N.E., 5th Floor, Washington, DC 20002, within thirty (30) days from the date of publication of this notice in the *D.C. Register*. Copies of the proposed rules may be obtained from the same address.

DEPARTMENT OF HEALTH

NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

The Director of the Department of Health, pursuant to the authority set forth in An Act to enable the District of Columbia to receive Federal financial assistance under Title XIX of the Social Security Act for a medical assistance program, and for other purposes, approved December 27, 1967 (81 Stat. 774; D.C. Official Code § 1-307.02), Reorganization Plan No. 4 of 1996, and Mayor's Order 97-42, dated February 18, 1997, hereby gives notice of the adoption, on an emergency basis, of an amendment to section 930 of Chapter 9 of Title 29 of the District of Columbia Municipal Regulations (DCMR), entitled "Nutrition Evaluation and Consultation Services." These rules establish standards governing reimbursement by the District of Columbia Medicaid Program for nutrition evaluation and consultation services provided by licensed nutritionists and dietitians to participants in the Home and Community-based Services Waiver for Persons with Mental Retardation and Developmental Disabilities (Waiver).

This rulemaking amends the previously published rules, 49 DCR 244 (January 11, 2002), to change the name of the rule, to add more effective planning of follow up reporting and to set limits on the amount of nutrition evaluation and consultation services.

Emergency action is necessary for the immediate preservation of the health, safety, and welfare of Waiver participants who are in need of nutrition evaluation and consultation services. These emergency rules are needed so that, on the effective date of the Waiver as modified, there shall be rules in place consistent with the provisions of the Waiver as modified to add more effective planning of follow up reporting and to set limits on the amount of nutrition evaluation and consultation services.

The District of Columbia Medicaid Program also is modifying the Waiver to reflect these changes. The Council of the District of Columbia has approved the corresponding Waiver. The U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services have also approved the Waiver with an effective date of November 20, 2007. The emergency rulemaking was adopted on November 19, 2007 and will become effective on November 20, 2007. The emergency rules will remain in effect for 120 days or until March 18, 2008, unless superseded by publication of a Notice of Final Rulemaking in the *D.C. Register*, whichever comes first.

The Director also gives notice of the intent to take final rulemaking action to adopt these proposed rules not less than thirty (30) days from the date of publication of this notice in the *D.C. Register*.

Section 930 (Nutritional Counseling Services) of Chapter 9 of Title 29 DCMR is deleted in its entirety and amended to read as follows:

930 NUTRITION EVALUATION AND CONSULTATION SERVICES

930.1 Nutrition evaluation and consultation services shall be reimbursed by the District of Columbia Medicaid Program for each participant with mental retardation and developmental disabilities in the Home and Community-based Services Waiver for Persons with Mental Retardation and Developmental Disabilities (Waiver) subject to the requirements set forth in this section.

930.2 To be eligible for reimbursement, nutrition evaluation and consultation services shall be:

- (a) Ordered by a physician if the individual has any history of weight that is significantly above or below recommended body weight, a history of gastrointestinal disorders, diabetes, swallowing disorders, or other medical conditions that can be a threat to health if nutrition is poorly managed;
- (b) Recommended by the interdisciplinary team if the issues are not medical in nature;
- (c) Reasonable and necessary to the treatment of the person's illness, injury, or long term disability or for the restoration or maintenance of function affected by the injury, illness or long term disability; and
- (d) Included in the person's IHP or ISP and Plan of Care.

930.3 Nutrition evaluation and consultation services may be used to address:

- (a) Evidence of weight gain or loss that creates health risk;
- (b) The need for a therapeutic diet;
- (c) The need for a diet with altered texture due to oral-motor problems;
- (d) The need for a diet related to allergies or other food intolerances or drug-nutrient interactions;
- (e) The need for counseling for the person and staff on the specifics of the needed diet plan;
- (f) The need for counseling on shopping, cooking, meal planning or meal preparation;

- (g) The need for counseling on safe storage and cooking of food;
- (h) The need for counseling on nutritional information about foods;
- (i) The need for counseling on how to eat a healthy, balanced diet within the constraints of special dietary needs, etc.; and/or,
- (j) The need for counseling the individual on how to develop a cycle of menus that incorporates his/her preferences and choices and ensures optimal outcomes.

930.4 Nutrition evaluation and consultation services shall include, as necessary, the following:

- (a) Comprehensive nutritional assessments;
- (b) Partial nutritional evaluations to include anthropometric assessments;
- (c) Biochemical, clinical dietary appraisals;
- (d) Food-drug interaction potential;
- (e) Health and safety environmental review of food preparation and storage areas;
- (f) Needs assessments for adaptive eating equipment and dysphagia management; or
- (g) Nutrition evaluation and consultation services on a wide variety of issues to promote improved health and increase the person's ability to manage their own diet in an effective manner including menu development, shopping, food preparation, food storage, and food preparation procedures based on physician's orders.

930.5 Nutritional counselors, without regard to their employer of record, shall be selected by the person receiving services or their guardian or legal representative to provide services to the person receiving services, and will be answerable to the person receiving services. Any organization substituting practitioners for more than a two week period or four visits due to emergency or lack of availability will request a case conference with the Department on Disability Services (DDS) Case Manager so that the person receiving services can select a new practitioner.

930.6 The nutrition evaluation and consultation services provider shall be responsible for providing written documentation in the form of reports, assessments, physician's orders, visit notes, progress notes, and other pertinent documentation of the person's progress or lack of progress, medical

conditions, functional gains and losses, and treatment goals that demonstrate that the services are and continue to be reasonable and necessary. The documentation shall include evidence that services did not exceed the authorized frequency and duration. The agency or nutrition evaluation and consultation services provider in private practice shall maintain a copy of the documentation for at least six (6) years after the person's date of service.

930.7 Each person providing nutrition evaluation and consultation services shall meet all of the following requirements:

- (a) Be licensed to practice dietetics or nutrition pursuant to the District of Columbia Health Occupations Revisions Act of 1985, effective March 25, 1986 (D.C. Law 6-99; D.C. Official Code § 3-1201 *et seq.*) or licensed to practice dietetics or nutrition in the jurisdiction where services are provided;
- (b) Have a minimum of one (1) year of experience working with persons with mental retardation and developmental disabilities;
- (c) Have the ability to develop and implement a nutrition plan based on an assessment of the person's nutritional condition and needs;
- (d) Be acceptable to the consumer and be able to communicate with the consumer;
- (e) Demonstrate annually that he or she is free from communicable disease as confirmed by an annual PPD skin test or documentation from a physician stating that the person is free from communicable disease; and
- (f) Have a current District of Columbia Medicaid Provider Agreement or be employed by a home health agency or social services agency that has a current District of Columbia Medicaid Provider Agreement that authorizes the service provider to bill for Nutrition Evaluation and Consultation Services under the Waiver.

930.8 The reimbursement rate for nutritional assessments shall be fifty-five dollars (\$55.00) an hour for a full nutritional assessment of the individual, preparation of summary documentation and delivery of that documentation. The tasks shall include updating medical records and verification that the documentation was delivered to the primary care physician (as necessary), DDS Case Manager and the place of residence of the person receiving services. The billable unit of service for nutrition evaluation and consultation services shall be fifteen (15) minutes. A provider shall provide at least eight (8) minutes of service in a span of fifteen (15) continuous minutes to bill a unit of service.

930.9 The reimbursement rate for ongoing nutrition evaluation and consultation

services shall be fifty-five dollars (\$55.00) per hour for the period specified in the nutritional assessment.

- 930.10 Nutrition evaluation and consultation services shall be limited to one hundred twenty (120) hours per year unless approved for additional hours by a physician.

930.99 DEFINITIONS

When used in this section, the following terms and phrases shall have the meanings ascribed:

Communicable Disease – Shall have the same meaning as set forth in section 201 of Chapter 2 of Title 22, District of Columbia Municipal Regulations.

Individual Habilitation Plan (IHP) – That plan as set forth in section 403 of the Mentally Retarded Citizens Constitutional Rights and Dignity Act of 1978, effective March 3, 1979 (D.C. Law 2-137; D.C. Official Code § 7-1304.03).

Individual Support Plan (ISP) – The successor to the individual habilitation plan (IHP) as defined in the 2001 Plan for Compliance and Conclusion of *Evans v. Williams*.

Person – An individual with intellectual and developmental disabilities who has been determined eligible to receive services under the Home and Community-based Services Waiver for Persons with Mental Retardation and Developmental Disabilities (Waiver).

Plan of Care – A written service plan that meets the requirements set forth in section 1904.4 of Title 29 DCMR, is signed by the person receiving services, and is used to prior authorize Waiver services.

Provider – Any non-profit, home health agency, social service agency or other business entity that provides services pursuant to these rules.

Waiver – Shall mean the Home and Community-based Services Waiver for Persons with Mental Retardation and Developmental Disabilities as approved by the Council of the District of Columbia (Council) and the U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), as may be further amended and approved by the Council and CMS.

Comments on the proposed rules shall be submitted in writing to Robert T. Maruca, Senior Deputy Director, Medical Assistance Administration, Department of Health, 825 North Capitol Street, N.E., 5th Floor, Washington, D.C. 20002, within thirty (30) days from the date of publication of this notice in the *D.C. Register*. Copies of the proposed rules may be obtained from the same address.

DEPARTMENT OF HEALTH**NOTICE OF EMERGENCY AND PROPOSED RULEMAKING**

The Director of the Department of Health, pursuant to the authority set forth in An Act to enable the District of Columbia to receive federal financial assistance under Title XIX of the Social Security Act for a medical assistance program, and for other purposes, approved December 27, 1967 (81 Stat. 744; D.C. Official Code § 1-307.02), Reorganization Plan No. 4 of 1996, and Mayor's Order 97-42, dated February 18, 1997, hereby gives notice of the adoption, on an emergency basis, of an amendment to section 932 of Chapter 9 of Title 29 of the District of Columbia Municipal Regulations (DCMR), entitled "Speech, Hearing and Language Services." These rules establish standards governing reimbursement by the District of Columbia Medicaid Program for speech, hearing, and language services provided by licensed or certified speech pathologists or audiologists to participants with mental retardation and developmental disabilities in the Home and Community-based Services Waiver for Persons with Mental Retardation and Developmental Disabilities (Waiver).

This rulemaking amends the rules previously published at 49 DCR 8716 (September 20, 2002) by adding more effective planning and follow up reporting.

Emergency action is necessary for the immediate preservation of the health, safety, and welfare of Waiver participants who are in need of speech, hearing and language services. These emergency rules are needed so that, on the effective date of the Waiver as modified, there will be rules in place consistent with the provisions of the Waiver as modified to include more effective planning and follow up reporting.

The District of Columbia Medicaid Program also is modifying the Waiver to reflect these changes. The Council of the District of Columbia has approved the corresponding Waiver. The U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services has also approved the Waiver effective November 20, 2007. This emergency rulemaking was adopted on November 19, 2007 and will become effective on November 20, 2007. The emergency rules will remain in effect for 120 days or until March 18, 2008, unless superseded by publication of a Notice of Final Rulemaking in the *D.C. Register*, whichever comes first.

The Director also gives notice of the intent to take final rulemaking action to adopt these proposed rules not less than thirty (30) days from the date of publication of this notice in the *D.C. Register*.

Section 932 (Speech, Hearing and Language Services) of Chapter 9 of Title 29 DCMR is deleted in its entirety and amended to read as follows:

932 SPEECH, HEARING, AND LANGUAGE SERVICES

- 932.1 Speech, hearing and language services shall be reimbursed by the Medicaid Program for each participant with mental retardation and developmental disabilities in the Home and Community-based Services Waiver for Persons with Mental Retardation and Developmental Disabilities (Waiver) subject to the requirements set forth in this section.
- 932.2 To be eligible for reimbursement, speech, hearing, and language services shall be:
- (a) Ordered by a physician if the individual has any history of aspiration, swallowing problems, tube feeding, or other medical issues;
 - (b) Recommended by the interdisciplinary team if the issues are not medical;
 - (c) Reasonable and necessary to the treatment of the person's illness, injury, or long term disability or to the restoration or maintenance of function affected by the injury, illness or long term disability; and
 - (d) Included in the person's individual habilitation plan (IHP) or individual support plan (ISP) and Plan of Care.
- 932.3 Speech, hearing and language services may be used to:
- (a) Address swallowing disorders;
 - (b) Assess communicative disorders;
 - (c) Assess potential for clearer speech;
 - (d) Assess potential for use of augmentative and alternative speech devices, methods, or strategies;
 - (e) Assess potential for sign language or other expressive communication methods;
 - (f) Conduct environmental reviews of communication in places employment, residence, and other sites as necessary; or
 - (g) Assist with recovery from a vocal disorder.

- 932.4 Speech, hearing and language services shall include, as necessary, the following:
- (a) A comprehensive assessment to determine the presence or absence of swallowing disorders (dysphagia);
 - (b) A comprehensive assessment of communicative disorders;
 - (c) A background review and current functional review of communication capabilities in different environments;
 - (d) A needs assessment for the use of augmentative and alternative speech devices, methods, or strategies;
 - (e) A needs assessment for the use of adaptive eating equipment;
 - (f) Assisting persons with voice disorders to develop proper control of vocal and respiratory systems for correct voice production;
 - (g) Teaching and training the person, family, provider caregivers, or other caregivers to augment the speech-language communication program; and
 - (h) Aural rehabilitation by teaching sign language and/or lip reading to people who have hearing loss.
- 932.5 Speech, hearing and language service providers, without regard to their employer of record, shall be selected by the person receiving services or their guardian or legal representative and shall be answerable to the person receiving services. Any organization substituting practitioners for more than a two (2) week period or four (4) visits due to emergency or lack of availability shall request a case conference with the Department on Disability Services Case Manager in order to arrange for the person receiving services to select a new practitioner.
- 932.6 The speech, hearing and language service provider shall be responsible for providing written documentation in the form of reports, assessments for speech, hearing and language services, physician's orders, visitation notes, progress notes, and other pertinent documentation of the person's progress or lack of progress, medical conditions, functional losses, and treatment goals that demonstrate that the services are and continue to be reasonable and necessary. The documentation shall include evidence that services did not exceed the authorized frequency and duration. The agency or speech, hearing and language service provider in private practice shall maintain a copy of the documentation for at least six (6) years after the person's date of service.

- 932.7 Each person providing speech, hearing and language services shall be an employee of a home health agency or social service agency or a speech pathologist or audiologist in private practice with a current District of Columbia Medicaid Provider Agreement that authorizes the provider to bill for Speech, Hearing and Language Services under the Waiver.
- 932.8 In addition to the other requirements of this section, the speech pathologist or audiologist in private practice shall meet all of the following conditions:
- (a) Maintain a private office, even if services are always furnished in the person's home;
 - (b) Meet all state and local licensure laws and rules;
 - (c) Maintain a minimum of one (1) million dollars in liability insurance;
 - (d) If services are provided in a private practice office space, the space shall be owned, leased or rented by the private practice and be used exclusively for the purpose of operating the private practice; and
 - (e) An assistant or aide shall be personally supervised by the speech pathologist or audiologist and employed by the speech pathologist or audiologist, by the partnership group to which the speech pathologist or audiologist belongs, or by the same private practice that employs the speech pathologist or audiologist. Personal supervision requires the speech pathologist or audiologist to be in the room during the performance of the service.
- 932.9 Each person providing speech, hearing and language services shall be a speech pathologist or audiologist who meets all of the following requirements:
- (a) Have the ability to develop and implement a plan of care based on an assessment of the person's speech, hearing and language needs;
 - (b) Have a minimum of two (2) years of experience as a speech pathologist or audiologist;
 - (c) Be acceptable to the person to whom services are provided;
 - (d) Demonstrate annually that he or she is free from communicable disease as confirmed by an annual PPD Skin Test or documentation from a physician;
 - (e) Have the ability to communicate with the person to whom services are provided;
 - (f) Be able to read, write, and speak the English language; and

- (h) Comply with the requirements of the Health-Care Facility Unlicensed Personnel Criminal Background Check Act of 1998, as amended, effective April 13, 2002 (D.C. Law 14-98; D.C. Official Code § 44-551 *et seq.*).

- 932.10 The reimbursement rate for speech, hearing and language services assessments shall be sixty-five dollars (\$65.00) an hour for a full assessment of the person, preparation of summary documentation, and delivery of that documentation. The billable unit of service for speech, hearing and language therapy services shall be fifteen (15) minutes. A provider shall provide at least eight (8) minutes of service in a span of fifteen (15) continuous minutes to bill a unit of service. The tasks shall include updating medical records and verifying that the documentation was delivered to the primary care physician (as necessary), DDS Case Manager, and the place of residence of the person receiving services.
- 932.11 The reimbursement rate for ongoing speech, hearing and language services shall be sixty-five dollars (\$65.00) per hour for the period specified in the speech, hearing and language report and approved by a physician for treatment of a swallowing disorder. The billable unit of service for speech, hearing and language therapy services shall be fifteen (15) minutes. A provider shall provide at least eight (8) minutes of service in a span of fifteen (15) continuous minutes to bill a unit of service.
- 932.12 For persons between the ages of 18 and 21 years old, Early Periodic Screening and Diagnostic Treatment services under the District of Columbia State Plan for Medical Assistance shall be fully utilized before accessing speech, hearing and language services under the Waiver.

932.99 DEFINITIONS

When used in this section, the following terms and phrases shall have the meanings ascribed:

Audiologist – A person who meets the education and experience requirements for a Certificate of Clinical Competence in the area of audiology granted by the American Speech Hearing Language Association or is licensed or certified as an audiologist in the state where the services are provided.

Clinical Record – A comprehensive compilation of medical and other data that identifies the person and justifies and describes the diagnosis and treatment of the person.

EPSDT – Early and Periodic Screening, Diagnostic, and Treatment Services are designed for Medicaid-eligible children under the age of twenty-one (21) that

include periodic screenings to identify physical and mental conditions, vision, hearing, and dental, as well as diagnostic and treatment services to correct conditions identified during screenings.

Individual Habilitation Plan (IHP) – That plan as set forth in section 403 of the Mentally Retarded Citizens Constitutional Rights and Dignity Act of 1978, effective March 3, 1979 (D.C. Law 2-137; D.C. Official Code § 7-1304.03).

Individual Support Plan (ISP) – The successor to the individual habilitation plan (IHP) as defined in the 2001 Plan for Compliance and Conclusion of *Evans v. Williams*.

Physician – A person who is authorized to practice medicine pursuant to the District of Columbia Health Occupations Revision Act of 1985, effective March 25, 1986 (D.C. Law 6-99; D.C. Official Code § 3-1201 *et seq.*) or licensed as a physician in the jurisdiction where services are provided.

Person – An individual with intellectual and developmental disabilities who has been determined eligible to receive services under the Home and Community-based Services Waiver for Persons with Mental Retardation and Developmental Disabilities (Waiver).

Plan of Care – A written service plan that meets the requirements set forth in section 1904.4 of Title 29 DCMR, is signed by the person receiving services, and is used to prior authorize Waiver services.

Private Practice – An individual whose practice is an unincorporated solo practice or unincorporated partnership. Private practice also includes an individual who is practicing therapy as an employee of an unincorporated practice, a professional corporation, or other incorporated therapy practice. Private practice does not include individuals when they are working as employees of a hospital, nursing facility, clinic, home health agency, rehabilitation facility or any other entity that has a Medicaid provider agreement which includes physical therapy in the provider's reimbursement rate.

Progress Note – A dated, written notation by a member of the health care team that summarizes facts about a person's care and response to treatment during a given period of time.

Provider – Any non-profit, home health agency, social service agency or other business entity that provides services pursuant to these rules.

Speech Pathologist – A person who meets the education and experience requirements for a Certificate of Clinical Competence in the areas of speech pathology granted by the American Speech Hearing Language Association or is licensed or certified as a speech pathologist in the state where the services are

provided.

Waiver – Shall mean the Home and Community-based Services Waiver for Persons with Mental Retardation and Developmental Disabilities as approved by the Council of the District of Columbia (Council) and the U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), as may be further amended and approved by the Council and CMS.

Comments on the proposed rules shall be submitted in writing to Robert T. Maruca, Senior Deputy Director, Medical Assistance Administration, Department of Health, 825 North Capitol Street, N.E., 5th Floor, Washington, D.C. 20002, within thirty (30) days from the date of publication of this notice in the *D.C. Register*. Copies of the proposed rules may be obtained from the same address.

DEPARTMENT OF HEALTH

NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

The Director of the Department of Health, pursuant to the authority set forth in an Act to enable the District of Columbia to receive federal financial assistance under Title XIX of the Social Security Act for a medical assistance program, and for other purposes, approved December 27, 1967 (81 Stat. 744; D.C. Official Code § 1-307.02), Reorganization Plan No. 4 of 1996, and Mayor's Order 97-42, dated February 18, 1997, hereby gives notice of the adoption, on an emergency basis, of an amendment to section 935 of Chapter 9 of Title 29 (Public Welfare) of the District of Columbia Municipal Regulations (DCMR), entitled "Occupational Therapy Services." These rules establish standards governing reimbursement by the District of Columbia Medicaid Program for occupational therapy services provided by a licensed occupational therapist to participants with mental retardation and developmental disabilities in the Home and Community-based Services Waiver for Persons with Mental Retardation and Developmental Disabilities (Waiver).

This rulemaking amends the previously published rules at 53 DCR 102 (January 6, 2006), by adding more effective planning and follow-up reporting and setting the reimbursement rate at sixty-five dollars (\$65) per hour.

Emergency action is necessary for the immediate preservation of the health, safety, and welfare of Waiver participants who are in need of occupational therapy services. These emergency rules are needed so that, on the effective date of the Waiver as modified, there will be rules in place consistent with the provisions of the Waiver as modified to add more effective planning and follow-up reporting and to set the reimbursement rate at sixty-five dollars (\$65) per hour.

The District of Columbia Medicaid Program is also modifying the Waiver to reflect these changes. The Council of the District of Columbia has approved the corresponding Waiver. The U.S. Department of Health and Human Services, Centers for Medicaid and Medicare Services have also approved the Waiver with an effective date of November 20, 2007. The emergency rulemaking was adopted on November 19, 2007 and shall become effective on November 20, 2007. The emergency rules shall remain in effect for 120 days or until March 18, 2008, unless superseded by publication of a Notice of Final Rulemaking in the *D.C. Register*, whichever comes first.

The Director also gives notice of the intent to take final rulemaking action to adopt these proposed rules not less than thirty (30) days from the date of publication of this notice in the *D.C. Register*.

Section 935 (Occupational Therapy Services) of Chapter 9 of Title 29 DCMR is deleted in its entirety and amended to read as follows:

935 OCCUPATIONAL THERAPY SERVICES

935.1 Occupational therapy services shall be reimbursed by the Medicaid Program for each participant in the Home and Community-Based Services Waiver for Persons with Mental Retardation and Developmental Disabilities subject to the requirements set forth in this section.

935.2 To be eligible for reimbursement, occupational therapy services shall be:

- (a) Ordered by a physician;
- (b) Reasonable and necessary to the treatment of the person's illness, injury, or long term disability or to the restoration or maintenance of function affected by the injury, illness or long term disability; and
- (c) Included in the person's individual habilitation plan (IHP) or individual support plan (ISP) and Plan of Care.

935.3 Each person providing occupational therapy services shall be an employee of a home health agency or an occupational therapist in private practice with a current District of Columbia Medicaid Provider Agreement that authorizes the provider to bill for occupational therapy services under the Waiver.

935.4 In addition to the other requirements of this section, the occupational therapist in private practice shall meet all of the following conditions:

- (a) Maintain a private office, even if services are always furnished in the person's home;
- (b) Meet all state and local licensure laws and rules;
- (c) Maintain a minimum of one (1) million dollars in liability insurance;
- (d) Ensure that occupational therapy services are provided consistent with the person's IHP or ISP and Plan of Care;
- (e) If services are provided in a private practice office space, the space shall be owned, leased or rented by the private practice and be used exclusively for the purpose of operating the private practice; and
- (f) An occupational therapy assistant, licensed in the District of Columbia (D.C. Laws 16-220 and 16-221) or in the state where services are provided, shall be personally supervised by the occupational therapist.

Occupational therapy assistants shall also be employed by the occupational therapist or the partnership group to which the occupational therapist belongs or the same private practice that employs the occupational therapist. Personal supervision requires the occupational therapist to be in the room during the performance of the service.

935.5 Each person providing occupational therapy services shall:

- (a) Be a licensed occupational therapist or be an occupational therapy assistant working under the direct supervision of a licensed occupational therapist;
- (b) Have a minimum of two (2) years of experience as an occupational therapist or occupational therapy assistant;
- (c) Be acceptable to the person to whom services are provided;
- (d) Demonstrate annually that he or she is free from communicable disease as confirmed by an annual PPD Skin Test or documentation from a physician;
- (e) Have at least one (1) year of experience working with persons with mental retardation and developmental disabilities;
- (f) Agree to carry out the responsibilities to provide services consistent with the person's IHP or ISP and Plan of Care;
- (g) Complete pre-service and in-service training approved by DDS;
- (h) Have the ability to communicate with the person to whom services are provided;
- (i) Be able to read, write, and speak the English language; and
- (j) Comply with the requirements of the Health-Care Facility Unlicensed Personnel Criminal Background Check Act of 1998, effective April 20, 1999 (D.C. Law 12-238), as amended by the Health-Care Facility Unlicensed Personnel Criminal Background Check Amendment Act of 2002, effective April 13, 2002 (D.C. Law 14-98; D.C. Official Code § 44-551 *et seq.*).

935.6 Each occupational therapist shall provide the Department on Disability Services (DDS) and the Medical Assistance Administration with a brochure listing their academic background, licensure information, experience and the nature of their practice to assist those who may receive services in making their provider selection.

- 935.7 An occupational therapist, without regard to their employer of record, shall be selected by the person receiving services or their guardian or legal representative to provide services to the person receiving services and shall be answerable to the person receiving services. Any organization substituting practitioners for more than a two week period or four visits due to emergency or availability events shall request a case conference with the DDS Case Manager so that the person receiving services can select a new practitioner.
- 935.8 The duties of each person providing occupational therapy services shall include, at a minimum, the following:
- (a) Preparing a report that summarizes the physician's order, measures the person's strength, range of motion, balance and coordination, posture, muscle performance, respiration, and motor functions and developing and describing treatment plans that describe treatment strategies including direct therapy, training caregivers, monitoring requirements, monitoring instruments, monitoring instructions, and anticipated outcomes;
 - (b) Maintaining ongoing involvement and consultation with other service providers and caretakers;
 - (c) Ensuring that the person's needs are met in accordance with the physician's order;
 - (d) Providing consultation and instruction to the person, family, or other caregivers;
 - (e) Recording progress notes on each visit; and
 - (f) Conducting periodic examinations and modifying treatments for the person receiving services, when necessary.
- 935.9 The occupational therapist shall be responsible for providing written documentation in the form of reports, assessments for occupational therapy services, physician's orders, visit notes, progress notes, and other pertinent documentation of the person's progress or lack of progress, medical conditions, functional losses, and treatment goals that demonstrate that the services are and continue to be reasonable and necessary. The documentation shall include evidence that services did not exceed the authorized frequency and duration as authorized for occupational therapy services in the physician's order. The agency or occupational therapist in private practice shall maintain a copy of the documentation for at least six (6) years after the person's date of service.
- 935.10 The reimbursement rate for occupational therapy services shall be sixty-five dollars (\$65.00) per hour for a full assessment of the individual, preparation of

summary documentation, and delivery of that documentation. The billable unit of service for occupational therapy services shall be fifteen (15) minutes. A provider shall provide at least eight (8) minutes of service in a span of fifteen (15) continuous minutes to bill a unit of service. The tasks shall include updating medical records and verification that the documentation was delivered to the primary care physician, DDS Case Manager and the place of residence of the person receiving services.

935.11 The reimbursement rate for ongoing occupational therapy services shall be sixty-five dollars (\$65.00) per hour for the period specified in the occupational therapy report and approved by the physician. The billable unit of service for occupational therapy services shall be fifteen (15) minutes. A provider shall provide at least eight (8) minutes of service in a span of fifteen (15) continuous minutes to bill a unit of service.

935.12 Each provider shall offer the Hepatitis B vaccination to each person providing services pursuant to these rules and maintain a copy of the acceptance or declination of the vaccine.

935.99 DEFINITIONS

When used in this section, the following terms and phrases shall have the meanings ascribed:

Clinical Record – A comprehensive compilation of medical and other data that identifies the person and justifies and describes the diagnosis and treatment of the person.

Individual Habilitation Plan (IHP) – That plan as set forth in section 403 of the Mentally Retarded Citizens Constitutional Rights and Dignity Act of 1978, effective March 3, 1979 (D.C. Law 2-137; D.C. Official Code § 7-1304.03).

Individual Support Plan (ISP) – The successor to the individual habilitation plan (IHP) as defined in the 2001 Plan for Compliance and Conclusion of *Evans v. Williams*.

Occupational Therapist – A person who is licensed or authorized to practice occupational therapy pursuant to the District of Columbia Health Occupations Revision Act of 1985, effective March 25, 1986 (D.C. Law 6-99; D.C. Official Code § 3-1201 *et seq.*) or licensed as an occupational therapist in the jurisdiction where services are provided.

Occupational Therapy Assistant – A person who is authorized to practice as an occupational therapy assistant under the direct supervision of a licensed occupational therapist pursuant to the District of Columbia Health Occupations Revision Act of 1985, effective March 25, 1986 (D.C. Law 6-99; D.C. Official Code § 3-1201 *et seq.*)

or licensed or authorized to practice as an occupational therapy assistant in the jurisdiction where services are provided.

Physician – A person who is authorized to practice medicine pursuant to the District of Columbia Health Occupations Revision Act of 1985, effective March 25, 1986 D.C. Law 6-99; D.C. Official Code § 3-1201 *et seq.*) or licensed as a physician in the jurisdiction where services are provided.

Person – An individual with intellectual and developmental disabilities who has been determined eligible to receive services under the Home and Community-based Services Waiver for Persons with Mental Retardation and Developmental Disabilities (Waiver).

Plan of Care – A written service plan that meets the requirements set forth in section 1904.4 of Title 29 DCMR, is signed by the person receiving services, and is used to prior authorize Waiver services.

Private Practice – An individual whose practice is an unincorporated solo practice or unincorporated partnership. Private practice also includes an individual who is practicing therapy as an employee of an unincorporated practice, a professional corporation, or other incorporated therapy practice. Private practice does not include individuals when they are working as employees of a hospital, nursing facility, clinic, home health agency, rehabilitation facility or any other entity that has a Medicaid provider agreement which includes physical therapy in the provider's reimbursement rate.

Progress Note – A dated, written notation by a member of the health care team that summarizes facts about a person's care and response to treatment during a given period of time.

Provider – Any non-profit, home health agency, social service agency or other business entity that provides services pursuant to these rules.

Waiver – Shall mean the Home and Community-based Services Waiver for Persons with Mental Retardation and Developmental Disabilities as approved by the Council of the District of Columbia (Council) and the U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), as may be further amended and approved by the Council and CMS.

Comments on the proposed rules shall be submitted in writing to Robert T. Maruca, Senior Deputy Director, Medical Assistance Administration, Department of Health, 825 North Capitol Street, N.E., 5th Floor, Washington, D.C. 20002, within thirty (30) days from the date of publication of this notice in the *D.C. Register*. Copies of the proposed rules may be obtained from the same address.

DEPARTMENT OF HEALTH

NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

The Director of the Department of Health, pursuant to the authority set forth in An Act to enable the District of Columbia to receive Federal financial assistance under Title XIX of the Social Security Act for a medical assistance program, and for other purposes, approved December 27, 1967 (81 Stat. 774; D.C. Official Code § 1-307.02), Reorganization Plan No. 4 of 1996, and Mayor's Order 97-42, dated February 18, 1997, hereby gives notice of the adoption, on an emergency basis, of an amendment to section 942 of Chapter 9 of Title 29 of the District of Columbia Municipal Regulations (DCMR), entitled "Family Training Services." These rules establish standards governing reimbursement by the District of Columbia Medicaid Program for family training services provided by qualified professionals to participants with mental retardation and developmental disabilities in the Home and Community-based Services Waiver for Persons with Mental Retardation and Developmental Disabilities (Waiver).

This rule amends existing section 942, previously published at 50 DCR 8476 (October 10, 2003), to provide more effective reporting, to update the prohibition against concurrent payments to reflect the new Waiver services, and to expand family training services to include uncompensated caregivers other than family. The District of Columbia Medicaid Program is also modifying the Waiver to reflect these changes. The Council of the District of Columbia has approved the Waiver modification, and the U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services has also approved the modified Waiver with an effective date of November 20, 2007.

Emergency action is necessary for the immediate preservation of the health, safety, and welfare of Waiver participants who are in need of family training services. The emergency rules are needed so that, on the effective date of the Waiver, as modified, there will be rules in place consistent with the provisions of the Waiver to provide more effective reporting and to update the prohibition against concurrent payments to reflect the new Waiver services. The emergency rulemaking was adopted on November 19, 2007, and became effective on November 20, 2007. The emergency rules will remain in effect for 120 days or until March 18, 2008, unless superseded by publication of a Notice of Final Rulemaking in the *D.C. Register*, whichever comes first.

The Director also gives notice of the intent to take final rulemaking action to adopt these proposed rules not less than thirty (30) days from the date of publication of this notice in the *D.C. Register*.

Section 942 (Family Training Services) of Chapter 9 of Title 29 DCMR is amended to read as follows:

942 FAMILY TRAINING SERVICES

- 942.1 The District of Columbia Medicaid Program shall provide reimbursement for family training services for each participant with mental retardation and developmental disabilities in the Home and Community-based Services Waiver for Persons with Developmental Disabilities and Mental Retardation (Waiver) subject to the requirements set forth in this section.
- 942.2 Family training services are training, counseling, coordination, and other professional support services offered to the families of persons enrolled in the Waiver or other uncompensated individuals providing support to Waiver participants. For purposes of family training services, an uncompensated individual may be a neighbor, friend, companion, or co-worker who provides uncompensated care, training, guidance, companionship or support to a Waiver participant.
- 942.3 Each family training provider, within the first four (4) hours of service, shall conduct an assessment and develop a Training Plan with training goals and techniques that will assist the caregivers to better support the participant in achieving the choices, goals and prioritized needs identified in the individual habilitation plan (IHP) or individual support plan (ISP) and Plan of Care.
- 942.4 If the caregivers decide to continue with the training, the Training Plan shall include measurable outcomes and a schedule for ongoing services. The family training provider shall send the Training Plan to the Department on Disability Services (DDS) Case Manager for prior authorization of ongoing services.
- 942.5 Family training services eligible for reimbursement shall include the following services:
- (a) Instruction on strategies to assist the participant in meeting his or her IHP or ISP and Plan of Care goals;
 - (b) Training on the use of equipment specified in the participant's IHP or ISP and Plan of Care;
 - (c) Training on meeting the needs of the participant;
 - (d) Counseling to address the psychological needs of the family;
 - (e) Training and supports to prepare a family to make informed decisions on how to select and coordinate the services of a family member; and
 - (f) Follow up training necessary to safely maintain the participant at home.

- 942.6 Family training services may be used by the participant, family, guardian, or other uncompensated caregiver to help with the development of the participant's IHP or ISP and Plan of Care.
- 942.7 Family training services may be used by the participant, family, guardian, or other uncompensated caregiver to help coordinate the delivery of behavioral support services, community support services, and other professional, therapeutic or support services under the Waiver.
- 942.8 Each provider of family training services shall:
- (a) Be a public or private agency or home health agency licensed to do business in the District of Columbia, Maryland or Virginia;
 - (b) Have a current District of Columbia Medicaid Provider Agreement that authorizes the provider to bill for family training services under the Waiver;
 - (c) Ensure that all family training services staff are qualified and properly supervised;
 - (d) Ensure that the service provided is consistent with the participant's IHP or ISP and Plan of Care;
 - (e) Maintain a copy of the participant's most recent IHP or ISP and Plan of Care;
 - (f) Participate in the participant's annual IHP or ISP and Plan of Care meeting or case conferences when indicated;
 - (g) Maintain records which document staff training and licensure, for a period of not less than six (6) years;
 - (h) Offer the Hepatitis B vaccination to each caregiver providing services pursuant to these rules and maintain a copy of the acceptance or declination of the vaccine;
 - (i) Provide training in infection control procedures consistent with the requirements of the Occupational Safety and Health Administration, U.S. Department of Labor, as set forth in 29 CFR § 1910.1030; and
 - (j) Maintain documentation in each participant's clinical record regarding the initial assessment of the family's training needs, the goals to be accomplished, the training provided on each visit, and the outcomes of each training.

942.9 Each person providing family training services shall:

- (a) Be licensed to practice graduate social work, independent clinical social work, occupational therapy, physical therapy, speech, hearing and language therapy or registered nursing pursuant to the District of Columbia Health Occupations Revision Act of 1985, effective March 25, 1986 (D.C. Law 6-99; D.C. Official Code § 3-1201.01 *et seq.*);
- (b) Be licensed to practice his or her profession within the jurisdiction where services are provided; or
- (c) Be a special education teacher with a Master's Degree in Special Education from an accredited college or university with an emphasis in developmental disabilities and have experience working with persons with mental retardation and developmental disabilities.

942.10 Each person providing family training services shall meet all of the following requirements:

- (a) Be at least eighteen (18) years of age;
- (b) Be acceptable to the participant to whom services are provided;
- (c) Demonstrate annually that he or she is free from communicable disease as confirmed by an annual PPD Skin Test or documentation from a physician;
- (e) Have at least one (1) year of experience working with persons with mental retardation and developmental disabilities;
- (f) Agree to carry out the responsibility to provide services consistent with the person's IHP or ISP;
- (g) Complete pre-service and in-service training approved by DDS;
- (h) Have the ability to communicate with the participant to whom services are provided;
- (i) Be able to read, write, and speak the English language; and
- (j) Comply with the requirements of the Health-Care Facility Unlicensed Personnel Criminal Background Check Act of 1998, effective April 20, 1999 (D.C. Law 12-238; D.C. Official Code § 44-551 *et seq.*).

942.11 The reimbursement rate for family training services shall be sixty dollars (\$60) per

hour. The billable unit of service for family training services shall be fifteen (15) minutes. A provider shall provide at least eight (8) minutes of service in a span of fifteen (15) continuous minutes to bill a unit of service.

942.12 Family training services shall not be used concurrently with:

- (a) Supported Living;
- (b) Residential Habilitation; or
- (c) Host Home.

942.99 DEFINITIONS

When used in this section, the following terms and phrases shall have the meanings ascribed:

Behavioral support services – Services that are designed as an ongoing preventive and consultative service to improve and maintain outcomes in the health, attitude and behavior of the person.

Communicable Disease – Shall have the same meaning as set forth in section 201 of Chapter 2 of Title 22, District of Columbia Municipal Regulations.

Community support services – Services that are designed to address immediate crisis events and to improve and maintain outcomes in the health, attitude and behavior of the person.

Family – Any person who is related to the participant receiving services by blood, marriage, adoption, or some other legal relationship, such as a foster relative, who lives with or provides care to the participant. A family member may include a parent, spouse, child, relative, foster relative, or in-law. The term does not include individuals who are employed to care for the participant.

Individual Habilitation Plan (IHP) – The plan set forth in section 403 of the Mentally Retarded Citizens Constitutional Rights and Dignity Act of 1978, effective March 3, 1979 (D.C. Law 2-137; D.C. Official Code § 7-1304.03).

Individual Support Plan (ISP) – The successor to the individual habilitation plan (IHP) as defined in the 2001 Plan for Compliance and Conclusion of *Evans v. Williams*.

Participant – An individual with intellectual and developmental disabilities who has been determined eligible to receive services under the Home and Community-based Waiver for Persons with Mental Retardation and Developmental Disabilities.

Plan of Care – A written service plan that meets the requirements set forth in

section 1904.4 of Title 29 DCMR, is signed by the person receiving services, and is used to prior authorize Waiver services.

Waiver – The Home and Community-based Services Waiver for Persons with Mental Retardation and Developmental Disabilities as approved by the Council of the District of Columbia (Council) and the U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), as may be further amended and approved by the Council and CMS.

Comments on the proposed rules shall be submitted in writing to Robert T. Maruca, Senior Deputy Director, Medical Assistance Administration, Department of Health, 825 North Capitol Street, N.E., 5th Floor, Washington, DC 20002, within thirty (30) days from the date of publication of this notice in the *D.C. Register*. Copies of the proposed rules may be obtained from the same address.

DEPARTMENT OF HEALTH**NOTICE OF EMERGENCY AND PROPOSED RULEMAKING**

The Director of the Department of Health, pursuant to the authority set forth in An Act to enable the District of Columbia to receive federal financial assistance under Title XIX of the Social Security Act for a medical assistance program, and for other purposes, approved December 27, 1967 (81 Stat. 744; D.C. Official Code § 1-307.02), Reorganization Plan No. 4 of 1996, and Mayor's Order 97-42, dated February 18, 1997, hereby gives notice of the adoption, on an emergency basis, of an amendment to section 994 to Chapter 9 of Title 29 of the District of Columbia Municipal Regulations (DCMR), entitled "Respite Care Services." These rules establish standards governing reimbursement by the District of Columbia Medicaid Program for respite care services, which is being renamed "Respite Services," to be provided by qualified providers to persons in the Home and Community-based Services Waiver for Persons with Mental Retardation and Developmental Disabilities (Waiver).

This rulemaking amends the previously published rules at 50 DCR 4943 (June 20, 2003), to change the name to respite services, to provide for both hourly and daily rates, to allow services to be provided in a person's home or in a provider's residential facility, to permit direct care staff to provide services, and to change the rates. Currently, respite care service is skilled nursing or personal care service that has hourly rates. Respite services is being modified to be provided as either hourly respite or daily respite, with in home respite being an hourly service that can only be delivered in the home of a primary caregiver who is not providing a Waiver residential service or in a community setting and daily respite being provided in a residential facility. In addition, respite has been modified so that both hourly and daily respite services may use direct care staff rather than skilled nursing staff or personal care staff, and skilled nursing services can be used concurrently with respite services. The total hour limits, without regard to which service option is chosen, have not changed, and the prohibition against concurrent payments has been modified to reflect the new Waiver services. Rates have been adjusted to reflect the change from skilled nursing or personal care services to unlicensed staff delivering respite services, and coordinating respite services that address more effective delivery of oversight and emergency procedures.

Emergency action is necessary for the immediate preservation of the health, safety, and welfare of Waiver participants who are in need of respite services. These emergency rules are needed so that, on the effective date of the Waiver as modified, there will be rules in place consistent with the provisions of the Waiver as modified to permit respite services to participants either in the person's home or in a provider's residential facility at hourly or daily rates and by appropriate staff under the Waiver.

The District of Columbia Medicaid Program also is modifying the Waiver to reflect these changes. The Council of the District of Columbia has approved the corresponding Waiver. The U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services have also approved the corresponding Waiver with an effective date of November 20, 2007. The emergency rulemaking was adopted on November 19, 2007, and will become effective on November 20, 2007. The emergency rules will remain in effect for 120

days or until March 18, 2008, unless superseded by publication of a Notice of Final Rulemaking in the *D.C. Register*, whichever comes first.

The Director also gives notice of the intent to take final rulemaking action to adopt these proposed rules not less than thirty (30) days from the date of publication of this notice in the *D.C. Register*.

Section 994 (Respite Care Services) of Chapter 9 of Title 29 DCMR is deleted in its entirety and amended to read as follows:

994 RESPITE SERVICES

- 994.1 Hourly or daily respite services shall be reimbursed by the District of Columbia Medicaid Program for each person in the Home and Community-based Services Waiver for Persons with Mental Retardation and Developmental Disabilities (Waiver) subject to the requirements set forth in this section.
- 994.2 Hourly or daily respite services consist of services provided to a person on a short-term basis because of the absence or need for relief of the primary caregiver.
- 994.3 Hourly respite services shall be provided in person's private residence or the residence of the family or in a community setting approved by the primary caretaker.
- 994.4 The following entities or individuals are not eligible to provide hourly respite services:
- (a) The person's primary caregiver;
 - (b) A spouse, parent of a minor child or legal guardian; or
 - (c) A provider already being compensated for the general care of the participant.
- 994.5 Individuals providing hourly respite services may be an adult family member, such as a sibling, aunt, uncle or cousin, if employed and trained by the Waiver service provider and subject to the limitations set forth in section 994.4.
- 994.6 Each provider of hourly or daily respite services shall be a:
- (a) Respite Provider Agency, certified by the Department on Disability Services (DDS);
 - (b) Supportive Living Provider;
 - (c) Residential Habilitation Provider; or
 - (d) Home health agency as defined in Chapter 19 of Title 29 DCMR.

- 994.7 Each support staff person providing hourly or daily respite services shall meet all of the conditions designated in Title 29 DCMR, Chapter 19, Section 1911 in addition to the requirements set forth below:
- (a) Complete competency based training in infection control procedures consistent with the requirements of the Occupational Safety and Health Administration, U.S. Department of Labor regulations at 29 CFR 1910.1030;
 - (b) Complete competency based training in emergency procedures; and
 - (c) Be certified annually in cardiopulmonary resuscitation and First Aid.
- 994.8 Each provider of hourly or daily respite services shall:
- (a) Have a current Medicaid Provider agreement to provide and bill Respite Services; and
 - (b) Maintain a copy of the person's most recent individual habilitation plan (IHP) or individual support plan (ISP) and Plan of Care and a description of all services the person is using.
- 994.9 Each provider of hourly or daily respite services shall ensure that each person receives hands-on supports including but not be limited to the following areas as needed:
- (a) Eating and drinking;
 - (b) Toileting;
 - (c) Personal hygiene;
 - (d) Dressing;
 - (e) Grooming;
 - (f) Monitoring health and physical condition and assistance with medication or other medical needs;
 - (g) Communications; and
 - (h) Opportunity for social, recreational, and religious activities utilizing community resources.
- 994.10 Each provider of hourly or daily respite services shall ensure that each person has access to community activities as delineated in the person's IHP or ISP and Plan of Care. Planning community activities or continuing already planned activities and accompanying the person to those activities, including coordinating transportation, is included in the rate for hourly or daily respite services. These activities include ensuring day program or employment attendance or other activities the person would receive if they were not in respite services.
- 994.11 Hourly respite services shall be reimbursed at the rate of twenty dollars and forty-four cents (\$20.44) per hour and shall be limited to seven hundred

twenty (720) hours per calendar year. Any request for hours in excess of 720 hours shall be submitted to DDS for approval and include a justification and supporting documentation. Hourly respite services are provided as an hourly service and can be scheduled for portions of a day. Group respite services offered in or from community based (e.g. community centers, schools, non-profit organizations) locations that offer community activities and opportunities for socialization shall be reimbursed at a rate of eleven dollars (\$11.00) per hour or three dollars and seventy-five cents (\$3.75) per fifteen minute unit assuming a staff to participant ratio of no more than one respite support person to three participants. A minimum of eight (8) minutes of continuous services must be provided to bill for a fifteen (15) minute unit. Hourly respite services may be extended in situations when the primary caretaker is hospitalized or otherwise unable to continue as a primary caretaker. Hourly respite services may only be extended for the time necessary for arrangements to be made for long term residential supports.

- 994.12 Day Habilitation, Prevocational Habilitation, or Supported Employment Services shall continue while the person is receiving hourly respite services, but shall not be billed concurrently.
- 994.13 Hourly respite services shall not be provided for persons receiving Supported Living, Host Home or Residential Habilitation Services, and shall only be provided in the person's current place of residence or in a community location.
- 994.14 Daily respite services shall be provided in:
- (a) A Group Home for Mentally Retarded Persons (GHMRP) licensed pursuant to the Health Care and Community Residence Facility, Hospice and Home Care Licensure Act of 1983, effective February 24, 1984 (D.C. Law 5-48; D.C. Official Code § 44-501 *et seq.*) meeting the requirements set forth in Chapter 35 of Title 22 DCMR and certified as an intermediate care facility for persons with mental retardation in accordance with the federal conditions of participation or a Residential Habilitation Services provider. The GHMRP and Residential Habilitation Services provider shall a Medicaid Provider Agreement for Respite Services;
 - (b) A Supported Living Residence (SLR) that meets the Department on Disability Services (DDS) Certification Standards and is operated by a provider with a Medicaid Provider Agreement for Respite Services and a Human Care Agreement that stipulates the conditions for accepting respite placements; or
 - (c) A dedicated respite facility that meets the DDS/DDA Certification Standards and is operated by a provider with a Medicaid Provider Agreement for Respite Services and a Human Care Agreement that stipulates the conditions for accepting respite placements. Respite

facilities shall meet the standards of GHMRPs or SLRs.

- 994.15 Daily respite service shall be reimbursed at the rate of three hundred ten dollars (\$310) per day and shall be limited to thirty (30) days per calendar year. Daily respite service may be extended in situations when the primary caretaker is hospitalized or otherwise unable to continue as a primary caretaker. Daily respite services may only be extended for the time necessary for arrangements to be made for long term residential supports. Daily respite service is provided as a daily service and a minimum of fourteen (14) hours of continuous service must be provided to bill for a day.
- 994.16 The provider shall maintain documentation of the date and amount of time the service is delivered, and shall record the activities engaged in, the person's response to those activities, and any unusual event or circumstance involving the person's health and welfare while respite services were delivered.

994.99 **DEFINITIONS**

When used in this section, the following terms and phrases shall have the meanings ascribed:

Direct Care Staff – Individuals employed to work in the person's home who render the day-to-day personal assistance that a person requires in order to meet the goals of their IHP or ISP and Plan of Care.

Individual Habilitation Plan (IHP) – That plan as set forth in section 403 of the Mentally Retarded Citizens Constitutional Rights and Dignity Act of 1978, effective March 3, 1979 (D.C. Law 2-137; D.C. Official Code § 7-1304.03).

Individual Support Plan (ISP) – The successor to the individual habilitation plan (IHP) as defined in the 2001 Plan for Compliance and Conclusion of *Evans v. Williams*.

Interdisciplinary Team – A group of persons with special training and experience in the diagnosis and habilitation of mentally retarded persons who have the responsibility of performing a comprehensive person evaluation while participating in the development, implementation, and monitoring of the person's IHP or ISP and Plan of Care.

Person – An individual with intellectual and developmental disabilities who has been determined eligible to receive services under the Home and Community-based Services Waiver for Persons with Mental Retardation and Developmental Disabilities (Waiver).

Plan of Care – A written service plan that meets the requirements set forth in section 1904.4 of Title 29 DCMR, is signed by the person receiving services, and is used to prior authorize Waiver services.

Provider – Any non-profit, home health agency, social service agency or other business entity that provides services pursuant to these rules.

Waiver – Shall mean the Home and Community-based Services Waiver for Persons with Mental Retardation and Developmental Disabilities as approved by the Council of the District of Columbia (Council) and the U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), as may be further amended and approved by the Council and CMS.

Comments on the proposed rules shall be submitted in writing to Robert T. Maruca, Senior Deputy Director, Medical Assistance Administration, Department of Health, 825 North Capitol Street, N.E., 5th Floor, Washington, D.C. 20002, within thirty (30) days from the date of publication of this notice in the *D.C. Register*. Copies of the proposed rules may be obtained from the same address.

DEPARTMENT OF HEALTH

NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

The Director of the Department of Health, pursuant to the authority set forth in An Act to enable the District of Columbia to receive federal financial assistance under Title XIX of the Social Security Act for a medical assistance program, and for other purposes, approved December 27, 1967 (81 Stat. 744; D.C. Official Code § 1-307.02), Reorganization Plan No. 4 of 1996, and Mayor's Order 97-42, dated February 18, 1997, hereby gives notice of the adoption of a new section 1914 of Chapter 19 of Title 29 of the District of Columbia Municipal Regulations (DCMR), entitled "Vehicle Modification Services." These rules establish standards governing reimbursement by the District of Columbia Medicaid program for vehicle modification services provided by qualified professionals to participants with mental retardation and developmental disabilities in the Home and Community-based Services Waiver for Persons with Mental Retardation and Developmental Disabilities (Waiver).

These rules establish standards governing the provision of VM services for persons participating in the Waiver. VM services is a new service designed to help the participant living in a natural home or with a primary caregiver to function with greater independence by adapting the vehicle to make it accessible to the participant (such as by installation of a wheelchair lift) or for the participant to drive. The service is limited to two (2) vehicles in a five (5) year period and a maximum of \$10,000 for this service per participant in a five (5) year period.

Emergency action is necessary for the immediate preservation of the health, safety, and welfare of Waiver participants who are in need of VM services. These emergency rules are needed so that, on the effective date of the Waiver as modified, there will be rules in place consistent with the provisions of the Waiver as modified to permit reimbursement of VM services for persons needing to adapt a vehicle with a limitation of \$10,000 per participant and no more than two (2) vehicles in a five (5) year period.

The District of Columbia Medicaid Program is also modifying the Waiver to reflect these changes. The Council of the District of Columbia has approved the corresponding Waiver. The U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services have also approved the Waiver with an effective date of November 20, 2007. The emergency rulemaking was adopted on November 19, 2007, and will become effective on November 20, 2007. The emergency rules will remain in effect for 120 days or until March 18, 2008, unless superseded by publication of a Notice of Final Rulemaking in the *D.C. Register*, whichever comes first.

The Director also gives notice of the intent to take final rulemaking action to adopt these proposed rules not less than thirty (30) days from the date of publication of this notice in the *D.C. Register*.

New section 1914 (Vehicle Modification Services) of Chapter 19 of Title 29 DCMR is added to reads as follows:

1914 VEHICLE MODIFICATION SERVICES

- 1914.1 Vehicle modification (VM) services shall be reimbursed for each participant with mental retardation and developmental disabilities in the Home and Community-based Services Waiver for Persons with Mental Retardation and Developmental Disabilities (Waiver) subject to the requirements set forth in this section.
- 1914.2 VM services are physical adaptations to a vehicle, required by a person's individual habilitation plan (IHP) or individual service plan (ISP) and Plan of Care that are necessary to ensure the health, welfare, and safety of a person, or that enable a person to live with greater independence in the community, and without which the person would be more likely to require institutionalization.
- 1914.3 VM services eligible for reimbursement shall be as follows:
- (a) Hydraulic lifts;
 - (b) Access ramps;
 - (c) Modified doors;
 - (d) Modified seating;
 - (e) Installing equipment to secure a wheelchair or other assistive technology device; and
 - (f) Installing equipment to make access, egress, or travel more comfortably, safe and secure.
- 1914.4 VM services shall be necessary to ensure the health, welfare, or safety of the person and enable the person to function with greater independence.
- 1914.5 To be approved as VM services, the services shall be:
- (a) Pre-authorized by the Department on Disability Services (DDS);
 - (b) Installed in one of the following:
 - (1) The person's vehicle; or
 - (2) The vehicle of the person's family, guardian, or other primary caretaker who is not providing Residential Habilitation Services or Supported Living Services.

- 1914.6 VM services shall not include the purchase or installation of child car seats; or the purchase of a vehicle or modification, adaptations or improvements to the vehicle that are of general utility or aesthetics and make no direct medical or remedial benefit to the person.
- 1914.7 VM services shall be authorized by the interdisciplinary team and provided in accordance with the person's IHP or ISP and Plan of Care.
- 1914.8 Each provider of VM services shall:
- (a) Be a non-profit organization or other business entity;
 - (b) Have a current District of Columbia Medicaid Provider Agreement that authorizes the provider to bill for VM services under the Waiver; and
 - (c) Comply with all applicable business licensing requirements in the District of Columbia or in the jurisdiction where VM services are provided.
- 1914.9 Before approving VM services, the provider of VM services shall perform an evaluation which:
- (a) Confirms that the vehicle is structurally sound;
 - (b) Confirms that the vehicle can accommodate the proposed VM services; and
 - (c) Recommends how the VM services should be installed.
- 1914.10 VM services shall be provided consistent with any stipulations or recommendations from the dealer of the vehicle's make and model.
- 1914.11 VM services shall be provided in accordance with the applicable federal, District, state, or local vehicle codes.
- 1914.12 Reimbursement for VM services shall be limited to ten thousand dollars (\$10,000) per participant over a five (5) year period and shall be limited to modifications to no more than two (2) vehicles in a five (5) year period. Exceptions to the five (5) year limitations in this paragraph on VM services may be approved by DDS on a case by case basis, with adequate supporting documentation.
- 1914.13 Reimbursement for VM services shall require written documentation of the specific expenditure or purchase for which reimbursement is claimed.

1914.99 **DEFINITIONS**

When used in this section, the following terms and phrases shall have the meanings ascribed:

Individual Habilitation Plan (IHP) – That plan as set forth in section 403 of the Mentally Retarded Citizens Constitutional Rights and Dignity Act of 1978, effective March 3, 1979 (D.C. Law 2-137; D.C. Official Code § 7-1304.03).

Individual Support Plan (ISP) – The successor to the individual habilitation plan (IHP) as defined in the 2001 Plan for Compliance and Conclusion of *Evans v. Williams*.

Person – An individual with intellectual and developmental disabilities who has been determined eligible to receive services under the Home and Community-based Services Waiver for Persons with Mental Retardation and Developmental Disabilities (Waiver).

Plan of Care – A written service plan that meets the requirements set forth in section 1904.4 of Title 29 DCMR, is signed by the person receiving services, and is used to prior authorize Waiver services.

Waiver – Shall mean the Home and Community-based Services Waiver for Persons with Mental Retardation and Developmental Disabilities as approved by the Council of the District of Columbia (Council) and the U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), as may be further amended and approved by the Council and CMS.

Comments on the proposed rules shall be submitted in writing to Robert T. Maruca, Senior Deputy Director, Medical Assistance Administration, Department of Health, 825 North Capitol Street, N.E., 5th Floor, Washington, DC 20002, within thirty (30) days from the date of publication of this notice in the *D.C. Register*. Copies of the proposed rules may be obtained from the same address.

D.C. DEPARTMENT OF HUMAN RESOURCES**NOTICE OF EMERGENCY AND PROPOSED RULEMAKING**

The Director of the D.C. Department of Human Resources, with the concurrence of the City Administrator, pursuant to Mayor's Order 2000-83, dated May 30, 2000 and Mayor's Order 2007-95, dated April 18, 2007; and in accordance with the provisions of the Child and Youth, Safety and Health Omnibus Amendment Act of 2004, effective April 13, 2005 (D.C. Law 15-353; D.C. Official Code § 4-1501.01 *et seq.*) (2006 Supp.), as amended by section 204 of Title II of the Omnibus Public Safety Amendment Act of 2006, effective April 24, 2007 (D.C. Law 16-306; D.C. Official Code § 4-1501.05) (2007 Supp.), hereby gives notice of the adoption of the following emergency rules. D.C. Law 16-306 amended D.C. Official Code § 4-1501.05, to: (1) modify the language and the list of offenses concerning the signed affirmation that must be completed by applicants subject to a criminal background check before the check is conducted; (2) add a new section 4-1501.05a, "Assessment of Information Obtained from Criminal Background Check," providing that the information obtained from a criminal background check shall not create a disqualification or presumption against employment or volunteer status of an applicant unless the Mayor determines that the applicant poses a present danger to children or youth, and listing the factors to be considered in making such a determination; and (3) afford individuals subjected to criminal background checks the right to appeal a denial of employment or volunteer status based on a finding that they pose a present danger to children or youth to the Office of Human Rights. D.C. Law 15-353 and D.C. Law 16-306 are referred to hereinafter in this preamble and these rules as "the Act." Because the Act requires that rules be issued to implement its provisions, and to ensure the preservation of the welfare of the public in general and the welfare of children and youth serviced by covered District government agencies in particular, action was taken on August 29, 2007 to adopt the following rules on an emergency basis effective August 29, 2007. In order to implement the provisions of the Act, sections 412 and 499 of Chapter 4, Organization for Personnel Management, of Title 6 of the District of Columbia Municipal Regulations (DCMR), were amended and new sections 413 through 425 were added to the chapter. Additionally, various provisions in sections 402, 403, 405, and 407 of the chapter, unrelated to the Act, were amended. These emergency rules will remain in effect for up to one hundred twenty (120) days from August 29, 2007, unless earlier superseded by another rulemaking notice.

The Director of the D.C. Department of Human Resources, with the concurrence of the City Administrator, pursuant to Mayor's Order 2000-83, dated May 30, 2000; Mayor's Order 2007-95, dated April 18, 2007; and the Act, hereby gives notice of the intent to adopt the following rules in not less than thirty (30) days from the publication of this notice in the *D.C. Register*. The purpose of these rules is to implement the provisions of the Act, by amending sections 412 and 499 of, and adding new sections 413 through 425 to, Chapter 4, Organization for Personnel Management, of Title 6 of the DCMR. In addition to the changes to section 412, various provisions in sections 402, 403, 405, and 407 of the chapter, unrelated to the Act, are being amended. Upon adoption, these rules will amend Chapter 4, Organization for Personnel Management, of Title 6 of the DCMR, published at 32 DCR 75 (January 4, 1985) and amended at 33 DCR 4447 (July 25, 1986), 51 DCR 928 (January 23, 2004), 51 DCR 11591 (December 24, 2004), and 52 DCR 6646 (July 15, 2005).

CHAPTER 4

ORGANIZATION FOR PERSONNEL MANAGEMENT

Chapter 4 of the D.C. Personnel Regulations is amended as follows:

Sections 402.1, 402.2, and 402.3 are amended to read as follows:

- 402.1 It shall be the policy of the District government to consider persons for employment who are suitable in efficiency, character, conduct, and reputation; and who have the knowledge and ability to perform the duties of the position sought. Pre-employment checks and background checks and investigations shall be conducted, as specified in this chapter, for the purpose of ascertaining applicants' fitness and suitability in these areas.
- 402.2 Employees in Information Technology Systems positions, as well as appointees to such positions, must be particularly suitable in character, conduct and reputation, because they have access to systems that house financial, proprietary, or sensitive personal data. Any misconduct, illegal action, or inaction on their part could directly compromise the security of the District government. For those reasons, these individuals shall be subject to separate suitability investigations as specified in section 406 of this chapter.
- 402.3 Each personnel authority shall determine, as part of pre-employment checks and background checks and investigations, whether a person being considered for employment is or has been involved in any act that constitutes a reasonable basis for concluding that the person would not faithfully discharge the duties of the position for which he or she is being considered.

Section 403 is amended as follows:

403 GENERAL PROVISIONS ON SUITABILITY

Section 403.1 is amended to read as follows:

- 403.1 Except for the provisions in sections 412 through 425 of this chapter, or otherwise provided by law or regulation, any pre-employment check, background check, or background investigation provisions negotiated between the District government and a labor organization shall take precedence over the provisions of this chapter, for employees in a bargaining unit represented by a labor organization, to the extent that there is a difference.
- 403.2 In securing information about individuals as part of pre-employment inquiries or background investigations under this chapter, each individual shall be afforded the necessary rights and protections.

Sections 403.3 through 403.5 are amended to read as follows:

- 403.3 When taking suitability administrative action against an employee under this chapter, personnel authorities shall ensure that the affected employee is afforded due process, and fair and equitable treatment.
- 403.4 (a) Except as otherwise specified in this chapter, pre-employment checks, background checks, and background investigations shall be initiated after the personnel authority has extended a written tentative job offer to the person selected and, to the extent practicable, before actual employment commences. For the purposes of this chapter, any job offer made under these circumstances is conditional and non-binding on the appropriate personnel authority or employing agency.
- (b) Upon completing the check or investigation, the personnel authority shall complete a review to determine whether a final job offer should be made or denied; or, if the person had begun to work pending the completion of the check or investigation, whether he or she should be retained or employment shall be terminated.
- 403.5 The Mayor may delegate his or her personnel authority, in whole or in part, to subordinate agency heads to conduct suitability checks and background investigations as described in this chapter.

The heading of section 405 is changed from "Suitability Checks and Background Investigations;" and the section is amended to read as follows:

405 PRE-EMPLOYMENT CHECKS AND BACKGROUND CHECKS AND INVESTIGATIONS

- 405.1 Each personnel authority shall establish the suitability for employment of an appointee by conducting pre-employment checks and background checks and investigations as described in this section.
- 405.2 Each personnel authority shall conduct the following pre-employment checks:
- (a) Prior employment checks to verify:
- (1) Dates of employment;
 - (2) Salary or other compensation received;
 - (3) Titles held and nature of duties performed;
 - (4) Reasons for leaving employment; and
 - (5) Performance.
- (b) Possession of a college degree shall be verified if the education was substituted for experience in qualifying the person for the position;

- (c) Possession of a professional or other type of license shall be verified if it is a prerequisite for employment; and
 - (d) Possession of a college degree from an accredited school and in the appropriate professional field shall be verified, including semester hours or other measures of credit completed, periods of attendance, type of degree and date conferred, if the degree is required as a job-related qualification standard such as is the case in the professional engineering field.
 - (e) Miscellaneous checks such as professional standing and other inquiries may also be conducted, if considered necessary by the personnel authority, and in addition to the pre-employment checks required in subsection 405.2 (a) through (d) of this section.
 - (f) In addition to the pre-employment checks required in subsection 405.2 (a) through (d) of this section, every new appointee shall be subject to completion of at least three (3) reference checks to ascertain character, reputation, relevant traits and characteristics, and other relevant personal qualities, and whether the reference would recommend the appointee for the position for which he or she is being considered.
 - (g) The three (3) reference checks specified in this section shall be made with the appointee's former employer, except that personal references may be utilized instead of, or in addition to, checks with former employers as deemed necessary by the personnel authority.
- 405.3 Based on the duties of the position, or if required by law or regulation, each personnel authority shall determine which positions, in addition to being subject to the pre-employment checks listed in section 405.2 of this section, shall be subject to background checks or investigations, or mandatory criminal background checks. The vacancy announcements for such positions, and for positions described in section 406 of this chapter, shall include a statement informing applicants of the specific requirement. The Director of the D.C. Department of Human Resources (or his or her designee) shall publish in the District Personnel Manual (or any other procedural manual or manuals developed) positions in subordinate agencies subject to background checks pursuant to this subsection, section 406 of this chapter, or any other law or regulation, as applicable.
- 405.4 Except for a mandatory criminal background check required by law or regulation, a background check under section 405.3 of this section shall be conducted in accordance with the following:
- (a) Before conducting the background check, the personnel authority shall determine the degree of sensitivity of the position being filled in order to determine the scope of the check. Based on that determination, the background check may cover, in addition to the requirements in section 405.2 of this section, the following:
 - (1) Additional reference checks;
 - (2) Employment history for a specific number of past years;

- (3) Highest education completed or last school attended beyond high school;
 - (4) A credit check that adheres to the notification and consent requirements of the Fair Credit Reporting Act and any other applicable law or regulation;
 - (5) A traffic record check; or
 - (6) A newspaper/magazine/media search on the appointee.
- (b) In conducting the background check, a personnel authority shall attempt to verify any derogatory information by seeking it from more than one (1) source, asking former employers and other sources for permission to name them as the source and, as needed, obtaining a written release from the subject.
- 405.5 Unless otherwise provided by law, regulation, or sections 412 through 425 of this chapter, in filling a position subject to background checks, a check need not be conducted if the appointee is already employed with the District government in a position subject to a background check; and the nature of the personnel action for the new appointment is one (1) of the following:
- (a) Promotion;
 - (b) Demotion;
 - (c) Reassignment; or
 - (d) An appointment or conversion of an employee who has been serving continuously with a District government agency for at least one (1) year in a position or positions under an appointment subject to a background check.
- 405.6 (a) Upon completing a check or investigation in accordance with this section, the personnel authority shall inform the agency of the results, and may make a determination that an appointee is not suitable for employment, and may thereby:
- (1) Deny him or her examination for or appointment to the position for which the person had been considered; or
 - (2) Require that the employing agency terminate the person from District government service in the case of a person who began employment before the pre-employment checks or background check was completed.
- (b) A subordinate agency that has been delegated personnel authority to conduct checks or investigations in accordance with this section shall promptly make the appropriate determination under section 405.6 (a) of this section upon completing the check or investigation, and immediately inform the D.C. Department of Human Resources of the determination, in writing.
- 405.7 Before taking suitability disqualification action against an appointee, and at the discretion of the personnel authority, the person may be given an opportunity to

explain the derogatory information found, in writing, within fifteen (15) days of the notification. The appointee must provide information to explain any discrepancies, omissions, or misinformation, or mitigating circumstances that may exist which are unknown.

405.8 The reasons which may be used in making a determination of disqualification of an appointee due to unsuitability may include, but shall not be limited to the following:

- (a) Delinquency or misconduct in prior employment;
- (b) Criminal, dishonest, or other conduct of a nature that would cause discredit to the District government;
- (c) A false statement of any material fact, or engagement in deception or fraud in the examination or appointment process;
- (d) Illegal use of drugs; or
- (e) Any other legal disqualification for appointment.

The heading of section 407 is changed from "Suitability Actions Initiated by Personnel Authorities against Employees;" and the section is amended to read as follows:

407 SUITABILITY ACTIONS AGAINST EMPLOYEES INITIATED BY PERSONNEL AUTHORITIES

407.1 The personnel authority shall initiate suitability action against a District government employee pursuant to this section when:

- (a) The personnel authority makes a determination that the employee provided a material false statement; engaged in deception or fraud in his or her examination or appointment with the District government; or engaged in the falsification of official personnel records;
- (b) Derogatory information about the employee, of a nature that constitutes an immediate hazard to the agency, the employee concerned, to other employees, or to the detriment of the public health, safety, or welfare, is disclosed by a credible source or independently discovered by the personnel authority or employing agency; or
- (c) Derogatory information about an employee, of a nature that will impact the employee's suitability to continue performing the duties of his or her position, is disclosed by a credible source or independently discovered by the personnel authority or employing agency.

407.2 In either of the circumstances described in section 407.1 of this section, the personnel authority shall:

- (a) Require that the employing agency remove the employee from District government service;
 - (b) In addition to requiring the employee's removal, require that the agency cancel any reinstatement eligibility, as applicable; or
 - (c) In addition to the actions in accordance with subsection 407.2 (a) and (b) of this section, deny the employee examination for and appointment to a position in the agency for a period of not more than three (3) years from the date of the determination of unsuitability.
- 407.3 If a determination is made that the suitability violation does not rise to the standard described in section 407.1 (a) of this section, the personnel authority may require that the employing agency take an administrative action against the employee that is less than removal.
- 407.4 The appropriate personnel authority shall determine the specific duration of any punitive period imposed under section 407.2 (c) of this section.
- 407.5 Subordinate agencies shall refer any case with circumstances as described in section 407.1 of this section to the Director of the D.C. Department of Human Resources.
- 407.6 The appropriate personnel authority shall ensure that any suitability action taken against an employee pursuant to this section is based on information or documentation that is accurate, timely, relevant, and complete.
- 407.7 Before taking any of the actions listed in sections 407.2 and 407.3 of this section, the employee shall be given an opportunity to explain the derogatory information, in writing, within fifteen (15) days of being notified thereof, to allow the appointee to provide information that would explain any discrepancies, omissions, or misinformation, or mitigating circumstances that may exist which are unknown to the personnel authority or the employing agency.

Section 407.8 is amended to read as follows:

- 407.8 Any suitability disqualification action against a subordinate agency head shall be taken by the Mayor (or his or her designee).

The heading of section 412 is changed from "Criminal Background Check and Traffic Record Check Requirements – District Government Agencies Considered Covered Child or Youth Services Providers;" and the section is amended to read as follows:

412 CRIMINAL BACKGROUND AND TRAFFIC RECORD CHECKS FOR THE PROTECTION OF CHILDREN AND YOUTH – GENERAL PROVISIONS

- 412.1 Pursuant to D.C. Official Code 4-1501.03 (2006 Supp.), the Mayor and other personnel authorities subject to these regulations shall be required to conduct criminal background checks and traffic record checks to investigate certain employees and volunteers, and persons being considered for employment with covered child or youth

services provider agencies, as specified in sections 412 through 425 and 499 of this chapter.

- 412.2 Each current employee in a covered position shall be subjected to an initial criminal background check beginning within forty-five (45) days of the publication in the D.C. Register of the notice of final rulemaking implementing the criminal background check requirements of the Act. The personnel authority shall notify each current employee in a covered position that he or she shall be subject to an initial criminal background check under the Act prior to conducting any such check.
- 412.3 Each current employee or volunteer in a covered position shall be required to submit to periodic criminal background checks while employed by or volunteering at a covered child or youth services provider agency. The provisions for periodic criminal background checks are specified in section 423 of this chapter.
- 412.4 The Mayor or the appropriate personnel authority shall conduct the criminal background checks under the Act.
- 412.5 Criminal background checks shall be conducted in accordance with Metropolitan Police Department (MPD) and Federal Bureau of Investigations (FBI) policies and procedures and in a FBI-approved environment, by means of fingerprint and National Criminal Information Center checks and procedures.
- 412.6 Agencies subordinate to the Mayor and independent District government agencies that are subject to the Act and these regulations shall cover the costs for criminal background checks and traffic record checks required under the Act.
- 412.7 Personnel authorities shall be responsible for conducting traffic record checks pursuant to the Act, and for developing internal operating procedures for conducting the checks.
- 412.8 Traffic record checks shall be obtained from the traffic records maintained by the D.C. Department of Motor Vehicles.

New sections 413 through 425 are added to read as follows:

413 CRIMINAL BACKGROUND AND TRAFFIC RECORD CHECKS FOR THE PROTECTION OF CHILDREN AND YOUTH – APPLICABILITY

- 413.1 Criminal background checks for the protection of children and youth shall be required for the following persons:
- (a) Each person being considered for paid employment with a covered child or youth services provider agency, and who is appointed to a position with duties and responsibilities as described in section 416 of this chapter or similar duties and responsibilities;
 - (b) Each person being considered for unsupervised voluntary service with duties and responsibilities as described in section 416 of this chapter, or similar duties and responsibilities, in a covered child or youth services provider agency;

- (c) Each paid employee who occupies a position with duties and responsibilities as described in section 416 of this chapter, or similar duties and responsibilities, in a covered child or youth services provider agency;
- (d) Each volunteer in an unsupervised position with duties and responsibilities as described in section 416 of this chapter, or similar duties and responsibilities, in a covered child or youth services provider agency; and
- (e) Any District government employee who serves as a host of a child or youth who participates in the Summer Youth Employment Program within the employee's agency. Such an employee shall be considered a volunteer in an unsupervised position for the purposes of the Act, and shall be subject to a criminal background check, a traffic record check, or both, before he or she is allowed to serve as host for the child or youth.

413.2 Criminal background checks shall not be required for the following persons:

- (a) Persons being considered for compensated or voluntary employment with child or youth services provider agencies that will not bring the persons in direct contact with children or youth;
- (b) Volunteers with covered child or youth services provider agencies who only have supervised contact with children or youth. If applicable, such persons will be required to submit to traffic record checks;
- (c) Persons being considered for compensated or voluntary employment in covered child or youth services provider agencies who have active federal security clearances; and
- (d) Officers and members of the MPD, because current standards for criminal background checks within the MPD exceed the requirements set forth in the Act.

413.3 Traffic record checks shall be conducted on employees, and supervised and unsupervised volunteers, and appointees who would be required to drive motor vehicles to transport children or youth in the course of performing their duties at covered child or youth services provider agencies.

414 CRIMINAL BACKGROUND AND TRAFFIC RECORD CHECKS FOR THE PROTECTION OF CHILDREN AND YOUTH – CHILD OR YOUTH SERVICES PROVIDER AGENCIES

414.1 The standard for determining that an agency is a covered child or youth services provider is that as part of its mission, the agency, as a whole or certain components thereof, provides the types of direct services to children or youth, or for the benefit of children or youth, encompassed in the duties and responsibilities listed in section 416 of this chapter:

414.2 The following subordinate agencies shall be considered covered child or youth services providers subject to the criminal background check and traffic record check provisions of the Act and these regulations.

- (a) Department of Human Services;
- (b) Department of Health;
- (c) Department of Parks and Recreation;
- (d) Fire Prevention Bureau (FPB) within the Fire and Emergency Medical Services Department (FEMSD), provided that the primary duties of any position designated as subject to the Act within the FPB shall require direct contact with children or youth, and the incumbent of the position would not otherwise be subject to a criminal background check or traffic record check in accordance with existing policies and practices for the FEMSD;
- (e) Youth Investigations Branch; Youth Violence Prevention Section; Office of Community Policing, Community Partnership Branch; and the Office of Human Services within the Metropolitan Police Department (MPD);
- (f) Traffic Safety Administration, within the District Department of Transportation;
- (g) Office of the State Superintendent of Education;
- (h) Department of Youth Rehabilitation Services;
- (i) Department of Employment Services;
- (j) Department of Mental Health;
- (k) Child and Family Services Agency;
- (l) Department of Disability Services;
- (m) D.C. Public Schools; and
- (n) Any other District government agency subject to these regulations which, as a result of a permanent or temporary change to its mission such as may be caused by reorganization or any other similar reason shall become a covered child or youth services provider subject to the criminal background check and traffic record check provisions in the Act.

415 CRIMINAL BACKGROUND AND TRAFFIC RECORD CHECKS FOR THE PROTECTION OF CHILDREN AND YOUTH – CHALLENGES TO DESIGNATION AS A CHILD OR YOUTH SERVICES PROVIDER AGENCY

- 415.1 Child or youth services provider agencies may challenge their designation and the requirement to comply with the Act, in writing, to the appropriate personnel authority.
- 415.2 The submission to the personnel authority shall include information and documentation deemed appropriate by agencies to challenge the designation.
- 415.3 The personnel authority shall evaluate the information and documentation submitted by an agency, and respond in writing within five (5) days of the receipt of the agency's challenge.
- 415.4 The decision of the personnel authority shall be final and non-appealable.

416 CRIMINAL BACKGROUND AND TRAFFIC RECORD CHECKS FOR THE PROTECTION OF CHILDREN AND YOUTH – STANDARDS AND PROCEDURES FOR IDENTIFYING COVERED POSITIONS

- 416.1 Upon consulting with the head of a covered child or youth services provider agency, the appropriate personnel authority shall identify and determine which positions in the agency shall be covered under the Act. In identifying the covered positions, the personnel authority shall ensure that the duties and responsibilities of each position require the provision of direct services that affect the health, safety, and welfare of children or youth or services for the benefit of children or youth, including but not limited to at least one (1) of the following duties, responsibilities, and essential functions or tasks:
- (a) Childcare duties;
 - (b) Recreational activities;
 - (c) Delinquency prevention and control services, including custody, security, supervision, and residential and community support services for committed and detained juvenile offenders;
 - (d) Educational activities;
 - (e) Individual counseling;
 - (f) Group counseling;
 - (g) Assessment, case management and support services;
 - (h) Psychiatric and psychological assessment services;
 - (i) Developmental, speech, and language evaluation services;

- (j) Diagnostic evaluation and treatment services;
- (k) Childhood development services;
- (l) Medical or clinical services;
- (m) Therapeutic services, including individual and group therapy, and play therapy;
- (n) Prevention and intervention services;
- (o) Mentoring services;
- (p) Youth care services;
- (q) Healthcare services, including medical, behavioral, mental health, dental, vision, nutrition, or developmental services;
- (r) Cultural enrichment services;
- (s) Public safety services, including counseling or education intervention services about safety, crime prevention, fire safety, youth problem-solving;
- (t) Youth employment services; or
- (u) Driving a motor vehicle to transport children or youth.

416.2 The following standards shall be applied in identifying positions, compensated or not, which shall be subject to the criminal background check requirement or the traffic record check requirement under the Act:

- (a) The underlying guiding standard to be applied in identifying positions that shall be subject to the criminal background check requirement and traffic record check requirement shall be one of reasonableness, coupled with the standards outlined in section 416.2 (b) through (k) of this section, as applicable.
- (b) A determination that a position is covered under the Act and subject to the criminal background check requirement shall be based on a comprehensive analysis of the position description or statement of duties, as applicable. The purpose of the analysis shall be to determine if the position description or statement of duties contains at least one (1) of the duties and responsibilities listed in this section or similar duties and responsibilities and that any incumbent of the position will perform the duties and responsibilities personally and routinely.
- (c) Location in a covered child or youth services provider agency does not automatically make a position or its incumbent subject to the criminal background check requirement or the traffic record check requirement of the Act.

- (d) Strictly tangential, casual, or occasional contact with children or youth does not automatically make an employee or volunteer subject to the criminal background check requirement or traffic record check requirement of the Act.
- (e) Administrative, clerical, or technical support positions within the immediate office of the head of a covered child or youth services provider agency, and other components, units, or divisions of the agency that provide non-operational support services shall not be subject to the criminal background check requirement unless the position descriptions or statements of duties, as applicable, contain at least one (1) of the duties and responsibilities listed in this section, or similar duties and responsibilities related to the direct provision of services to children or youth, and a determination is made that any incumbents of the positions will perform the duties and responsibilities personally and routinely.
- (f) An employee who is detailed, temporarily promoted, or temporarily reassigned from a non-covered position to a covered position shall be subject to an initial criminal background check upon the effective date of the personnel action, and to periodic criminal background checks while detailed, temporarily promoted, or temporarily reassigned to the covered position.
- (g) A volunteer whose assignment changes from non-covered duties and responsibilities to covered duties and responsibilities shall be subject to an initial criminal background check upon being moved to the covered assignment and to periodic criminal background checks while in the covered assignment.
- (h) A determination that a position is subject to the traffic record check requirement under the Act shall be based on a comprehensive analysis of the position description or statement of duties, as applicable. The purpose of the analysis shall be to determine if the position description or statement of duties requires that any incumbent of the position drive a motor vehicle, whether the incumbent's personal or government vehicle, to transport children or youth in the course of performing his or her duties.
- (i) An employee who is detailed, temporarily promoted, or temporarily reassigned from a non-covered position to a position that will require him or her to drive a motor vehicle to transport children or youth in the course of performing the duties of the detail, temporary promotion, or temporary reassignment shall be subject to an initial traffic record check upon the effective date of the personnel action.
- (j) A volunteer whose assignment changes from non-covered duties and responsibilities to duties and responsibilities that will require him or her to drive a motor vehicle to transport children or youth in the course of performing the duties of the voluntary assignment shall be subject to an initial traffic record check requirement upon being moved to the covered assignment.
- (k) Except as specified in section 413.2 of this chapter, any position subject to the traffic record check requirement shall also be subject to the criminal background check requirement.

416.3 The Director of the D.C. Department of Human Resources (or his or her designee), shall publish the list of positions in agencies under the personnel authority of the Mayor that are subject to a criminal background check or traffic record check, or both, in the District Personnel Manual (or any other procedural manual developed). The list shall be published at least annually; and republished as needed to delete or add positions.

417 CRIMINAL BACKGROUND AND TRAFFIC RECORD CHECKS FOR THE PROTECTION OF CHILDREN AND YOUTH – RECRUITMENT

417.1 In the case of competitive recruitment for a position requiring a criminal background check or traffic record check, or both, the vacancy announcement and subsequent offer letter to the appointee shall include statements with the following information:

- (a) That the position for which he or she is applying has been identified and designated as requiring a criminal background check or traffic record check, or both;
- (b) That, if tentatively selected for the position, a criminal background check or traffic record check, or both, as appropriate, will be conducted; and
- (c) That the appointee to the position may be offered employment contingent upon receipt of a satisfactory criminal background check or traffic record check, or both.

417.2 In the case of non-competitive recruitment for a position requiring a criminal background check or traffic record check, or both, the offer letter to the person being considered for employment shall inform the person of the requirements specified above for competitive recruitment actions.

417.3 Subject to the approval of the personnel authority, an appointee to a compensated position with a covered child or youth services provider agency may be offered employment contingent upon receipt of a satisfactory criminal background check or traffic record check, or both, and begin working in a supervised setting, prior to receiving the results of the checks, and prior to the employing agency making a determination that the appointee meets the requirements of the Act.

418 CRIMINAL BACKGROUND AND TRAFFIC RECORD CHECKS FOR THE PROTECTION OF CHILDREN AND YOUTH – AUTHORIZATION PROCESS

418.1 Prior to a criminal background check being conducted, the appropriate personnel authority will inform each appointee, employee, or unsupervised volunteer subject to the check of the location of the office where the check will be conducted; when to report for fingerprinting; and provide each appointee, employee, or unsupervised volunteer with a form or forms to be utilized for the following purposes:

- (a) To authorize the MPD or other entity, as appropriate, to conduct the criminal background check and confirm that the appointee, employee, or unsupervised

volunteer has been informed that the employing agency is authorized to conduct a criminal background check;

- (b) To complete a signed affirmation stating whether or not the appointee, employee, or unsupervised volunteer:
 - (1) Has or has not been convicted of any of the offenses listed in subsection 418.1 (c)(1) through (9) of this section, or their equivalent, either in the District of Columbia, or in any state or territory;
 - (2) Has or has not pleaded nolo contendere to any of the felony offenses listed in subsection 418.1 (c)(1) through (9) of this section, or their equivalent, either in the District of Columbia, or in any state or territory;
 - (3) Is or is not on probation before judgment or placement upon a stet docket of a case involving any of the felony offenses on the list in subsection 418.1 (c)(1) through (9) of this section, or their equivalent, in the District of Columbia, or in any state or territory; and
 - (4) Has or has not been found not guilty by reason of insanity, for any sexual offenses or intra-family offenses in the District of Columbia; or for any of the felony offenses listed in subsection 418.1 (c)(1) through (9) of this section, either in the District of Columbia, or in any state or territory.
- (c) The list of offenses referred to in subsection 418.1 (b)(1) through (4) of this section relating to the signed affirmation to be completed by the appointee, employee, or unsupervised volunteer is as follows:
 - (1) Murder, attempted murder, manslaughter, or arson;
 - (2) Assault, assault with a dangerous weapon, mayhem, malicious disfigurement, or threats to do bodily harm;
 - (3) Burglary;
 - (4) Robbery;
 - (5) Kidnapping;
 - (6) Illegal use or possession of a firearm;
 - (7) Sexual offenses, including indecent exposure; promoting, procuring, compelling, soliciting, or engaging in prostitution; corrupting minors (sexual relations with children); molesting; voyeurism; committing sex acts in public; incest; rape; sexual assault; sexual battery; or sexual abuse; but excluding sodomy between consenting adults;
 - (8) Child abuse or cruelty to children; or

- (9) Unlawful distribution or possession of or possession with intent to distribute a controlled substance;
 - (d) To acknowledge in writing that the appointee, employee, or unsupervised volunteer has been notified of his or her right to obtain a copy of the criminal background check report and to challenge the accuracy and completeness of the report;
 - (e) To acknowledge that the employing agency may choose to deny the appointee employment or an unsupervised volunteer position, or to terminate an employee or volunteer, based on the outcome of the criminal background check;
 - (f) To provide any additional identification that is required, such as name, social security number, date of birth, and gender; and
 - (g) To inform the appointee or employee that a false statement on the form or forms may subject the appointee or employee to criminal penalties.
- 418.2 Upon receiving and completing the form or forms specified in this section, the appointee or employee shall report to the designated location to be fingerprinted.
- 419 CRIMINAL BACKGROUND AND TRAFFIC RECORD CHECKS FOR THE PROTECTION OF CHILDREN AND YOUTH – REVIEW AND DETERMINATION PROCESS**
- 419.1 The Mayor's authority to make suitability determinations under this section is delegated to the appropriate personnel authority.
- 419.2 Upon completing each criminal background check, the designated MPD representative, or the representative for any other entity conducting the check, shall forward the check to the appropriate personnel authority.
- 419.3 Upon receipt of the criminal background check, the personnel authority shall complete a review and determination process as specified in this section.
- 419.4 The personnel authority shall conduct an initial review of the criminal background check, to determine if the appointee has a criminal record, including any of the proscribed offenses, and determine if there are any charges with no clear disposition.
- 419.5 The information obtained from a criminal background check shall not immediately disqualify or create a presumption against employment or volunteer status of an appointee, employee, or unsupervised volunteer with a criminal record, including a proscribed offense, unless the Mayor determines that because of such criminal record, the person would pose a present danger to children or youth that makes him or her unsuitable for paid employment of unsupervised voluntary service in a covered position. This determination shall be made based on the following seven (7) factors:

- (a) The specific duties and responsibilities necessarily related to the employment sought;
- (b) The bearing, if any, the criminal offense for which the appointee was previously convicted will have on his or her fitness or ability to perform one (1) or more of the duties or responsibilities of the position;
- (c) The time which has elapsed since the occurrence of the criminal offense;
- (d) The age of the appointee at the time of the occurrence of the criminal offense;
- (e) The frequency and seriousness of the criminal offense;
- (f) Any information produced by the appointee, or produced on his or her behalf, in regard to his or her rehabilitation and good conduct since the occurrence of the criminal offense; and
- (g) The public policy that is beneficial generally for ex-offenders to obtain employment.

419.6 When there is a discovery of charges with no clear disposition, the personnel authority shall:

- (a) Contact the appointee and inform him or her of the charges with no clear disposition contained in the criminal background check;
- (b) Notify the appointee, in writing, that he or she has five (5) business days to provide the necessary information on the final disposition of the charges; and
- (c) Determine whether or not the information submitted by the appointee resolve the charges with no clear disposition.

419.7 Notwithstanding the seven (7) factors listed in section 419.5 of this section, a covered District government agency shall not employ or permit to serve as an unsupervised volunteer an appointee who has been convicted of, has pleaded nolo contendere, is on probation before judgment or placement of a case upon a stet docket, or has been found not guilty by reason of insanity for any sexual offenses involving a minor.

419.8 When the personnel authority resolves criminal background check information issues, the personnel authority shall make the final suitability determination whether:

- (a) A final offer of appointment should be made or denied; or
- (b) A person appointed to a compensated position who had begun to work in a supervised setting prior to receiving the results of the check should be retained or employment shall be terminated.

- 419.9 The personnel authority shall notify the employing agency of the final suitability determination.
- 419.10 Upon determining that a final offer of appointment should be made to an appointee, the appropriate personnel authority shall promptly issue a final offer letter to the appointee. If the determination is to terminate employment, the personnel authority shall issue a termination letter to the employee, and process the action to terminate the employment within ten (10) days of making the determination.
- 419.11 In completing the review and determination process of traffic records checks, records of traffic infractions shall be judged on an individual basis for appointees whose duties would include driving a motor vehicle to transport children or youth as described in the Act. A pattern of disregard for existing traffic regulations, particularly where there has been a conviction for driving under the influence of intoxicants or drugs, may make the appointee unsuitable for employment or voluntary service, if the appointee could be required to drive a motor vehicle to transport children or youth in the course of performing his or her duties.
- 419.12 A final suitability determination on a criminal background check or traffic record check pursuant to this section shall be the final agency decision.

420 CRIMINAL BACKGROUND AND TRAFFIC RECORD CHECKS FOR THE PROTECTION OF CHILDREN AND YOUTH – CHALLENGE PROCESS

- 420.1 After the review and determination process under section 419 of this chapter is completed, a person who is denied a final offer of appointment or whose employment is terminated because of a determination that he or she committed a proscribed offense may challenge the final decision with the Office of Human Rights.
- 420.2 A person claiming to be aggrieved by an unlawful discriminatory practice on the part of District government agencies, officials, or employees, may elect to file an administrative complaint under the rules of procedure established by the Office of Human Rights pursuant to D.C. Official Code § 2-1401.01 *et seq.* (2006 Supp.).

421 CRIMINAL BACKGROUND AND TRAFFIC RECORD CHECKS FOR THE PROTECTION OF CHILDREN AND YOUTH – PENALTY FOR PROVIDING FALSE INFORMATION

- 421.1 An appointee to a position subject to the Act who intentionally provides false information that is material to the application in the course of applying for a position shall be subject to prosecution pursuant to section 404 of the District of Columbia Theft and White Collar Crimes Act of 1982.

422 CRIMINAL BACKGROUND AND TRAFFIC RECORD CHECKS FOR THE PROTECTION OF CHILDREN AND YOUTH – APPLICATION BY VOLUNTEERS TO MULTIPLE COVERED UNSUPERVISED POSITIONS

- 422.1 A volunteer in an unsupervised position may use the same successful criminal background check conducted on him or her for a period of two (2) years when

applying for multiple unsupervised volunteer positions, if the volunteer provides a signed affirmation stating whether or not he or she has been convicted of a crime, has pleaded nolo contendere, is on probation before judgment or placement of a case upon a stet docket, or has been found not guilty by reason of insanity, for any sexual offenses or intra-family offenses in the District of Columbia or their equivalent in any other state or territory, or for any of the felony offenses listed in section 418.1 (c)(1) through (9) of this chapter, or their equivalent in any other state or territory, since the date of the most recent check.

423 CRIMINAL BACKGROUND AND TRAFFIC RECORD CHECKS FOR THE PROTECTION OF CHILDREN AND YOUTH – PERIODIC CRIMINAL BACKGROUND CHECKS

423.1 For the purposes of this section, the following term has the meaning ascribed:

Administrative action – official reprimands, suspensions, reductions in grade, or removals under the corrective and adverse action provisions for the Career Service contained in Chapter 16 of these regulations; and other similar penalties, up to and including removal, for employees in services other than the Career Service.

423.2 A periodic criminal background check for each current employee and unsupervised volunteer occupying a covered position shall be conducted within two (2) years of the required initial criminal background, and every two (2) years thereafter. Each employee or unsupervised volunteer subject to the check shall complete the signed affirmation described in section 418 of this chapter prior to submitting to the periodic criminal background check.

423.3 In addition to the two-year (2-year) periodic criminal background check, a criminal background check shall be conducted when:

- (a) Derogatory information about an employee or unsupervised volunteer, of a nature that will impact their suitability to continue performing the duties of their covered positions is disclosed to the employing agency or personnel authority by a credible source or sources, or is independently discovered by the employing agency or personnel authority; or
- (b) Information about a criminal offense committed by the employee or unsupervised volunteer, such as the criminal offenses listed in section 418 of this chapter, is disclosed to the employing agency or personnel authority by a credible source or sources, or is independently discovered by the employing agency or personnel authority.

423.4 Separate from the requirements for periodic criminal background checks described in this section, each covered employee and unsupervised volunteer shall disclose to his or her supervisor any arrest, conviction of a crime, plea of nolo contendere, probation before judgment or placement of a case upon a stet docket, or if he or she has been found not guilty by reason of insanity, for any sexual offenses or intra-family offenses in the District of Columbia or their equivalent in any other state or territory, or for any

of the felony offenses listed in section 418 (c)(1) through (9) of this chapter, or their equivalent in any other state or territory, immediately after any of these actions occur.

- 423.5 As applicable, the employing agency shall inform the personnel authority of any employee who fails to make disclosure as specified in this section. The personnel authority shall conduct an evaluation for suitability; determine if administrative action against the employee is warranted; and notify the agency of the course of action that shall be taken.
- 423.6 An employee who intentionally misinforms or misleads the personnel authority when completing a signed affirmation; fails a periodic criminal background check; or fails to make disclosure under section 423.4 of this section, may be subject to administrative action. In determining the type of administrative action to be taken, the seven (7) factors listed in section 419.5 of this chapter shall be considered, if applicable, and any other similar factors and variables, except that a criminal background check or employee disclosure reflecting that the employee has been convicted of, has pleaded nolo contendere, is on probation before judgment or placement of a case upon a stet docket, or has been found not guilty by reason of insanity for any sexual offenses involving a minor shall result in removal.
- 423.7 In addition to or in the place of administrative action, an employee who fails a periodic check may be reassigned to a non-covered position, except that this option shall not be available for an employee whose criminal background check reflects that he or she has been convicted of, has pleaded nolo contendere, is on probation before judgment or placement of a case upon a stet docket, or has been found not guilty by reason of insanity for any sexual offenses involving a minor.
- 423.8 An unsupervised volunteer who fails a periodic criminal background check may be terminated or moved to another volunteer assignment that does not include the provision of direct services to children or youth. In determining the type of action to be taken, the personnel authority shall consider the seven (7) factors listed in section 419.5 of this chapter, as applicable, except that a criminal background check reflecting that the unsupervised volunteer has been convicted of, has pleaded nolo contendere, is on probation before judgment of a case upon a stet docket, or has been found not guilty for reason of insanity for any sexual offenses involving a minor shall result in the termination of the voluntary services.
- 423.9 In the case of an agency that violates any of the provisions of the Act, the Mayor (or his or her designee) or personnel authority may take administrative action, or direct that administrative action be taken, against the agency head or other agency official who violated the particular provision or provisions of the Act.

424 CRIMINAL BACKGROUND AND TRAFFIC RECORD CHECKS FOR THE PROTECTION OF CHILDREN AND YOUTH – CONFIDENTIALITY PROVISIONS

- 424.1 Criminal background check records obtained under this section shall be confidential and shall be for the exclusive purpose of making employment-related determinations

under this section. The records shall not be released or otherwise disclosed to any person, except when:

- (a) Required as one component of an application for employment with a District government agency considered a covered child or youth services provider;
- (b) Requested by the personnel authority during an official inspection or investigation;
- (c) Ordered by a court;
- (d) Authorized by the written consent of the person being investigated; or
- (e) Utilized for an administrative action in a personnel proceeding, including but not limited to, disciplinary actions under Chapter 16 of these regulations.

424.2 An individual who discloses confidential information in violation of any of the provisions in section 424.1 of this section shall be guilty of a criminal offense and, upon conviction, shall be fined not more than one thousand dollars (\$1,000) or imprisoned for not more than one hundred eighty (180) days, or both.

425 CRIMINAL BACKGROUND AND TRAFFIC RECORD CHECKS FOR THE PROTECTION OF CHILDREN AND YOUTH – REPORTING REQUIREMENTS

425.1 As applicable, the Director of the D.C. Department of Human Resources, and each independent personnel authority for agencies considered covered child or youth services providers under the Act, shall prepare compliance reports every six (6) months beginning on the date that these regulations are effective. Each report shall be submitted to the Mayor and shall include:

- (a) The number of criminal background checks and traffic record checks conducted for appointees, the number of appointees who were hired upon completion of the check, and the number rejected; and
- (b) The number of periodic criminal background checks conducted for employees and unsupervised volunteers, and any administrative action initiated or taken upon completion of the periodic checks.

425.2 On an annual basis by December 1st of every year, subordinate and independent agencies considered covered child or youth services providers under the Act shall submit, directly to the Mayor, a list with each position in the agency which has been identified as a covered position subject to the criminal background check requirement.

Section 499 is amended to read as follows:

499 DEFINITIONS

499.1 When used in this chapter, the following terms have the meaning ascribed:

Applicant – for the purposes of sections 412 through 425 of this chapter, a person who has filed a resume or written or electronic (web-based) application for employment with a covered child or youth services provider agency; or a person who has made an affirmative effort through written application, resume or a verbal request, to serve in an unsupervised volunteer position with a covered child or youth services provider agency.

Appointee – for the purposes of sections 412 through 425 of this chapter, a person who has been made a tentative job offer to a covered position, compensated or voluntary, subject to the satisfactory completion of a criminal background check or traffic record check, or both.

Children – for the purposes of sections 412 through 425 of this chapter, persons twelve (12) years of age and under.

Covered assignment – for the purposes of sections 412 through 425 of this chapter, tasks of a volunteer with a covered child or youth services provider agency which require the volunteer to provide direct services that affect the health, safety, and welfare of children or youth, including but not limited to the duties and responsibilities listed in section 416 of this chapter.

Covered child or youth services provider – for the purposes of sections 412 through 425 of this chapter, any District government agency, or a component of a District government agency such as an office, unit or division, including the agencies listed in section 414 of this chapter, that provides direct services that affect the health, safety, and welfare of children or youth, including individual and group counseling, therapy, case management, supervision, or mentoring. These services are provided either directly or for the benefit of children or youth.

Covered duties and responsibilities – for the purposes of sections 412 through 425 of this chapter, duties and responsibilities of a volunteer in a covered child or youth services provider agency that require the volunteer to provide direct services that affect the health, safety, and welfare of children or youth or services for the benefit of children or youth, including but not limited to the duties and responsibilities listed in section 416 of this chapter.

Covered position – for the purposes of sections 412 through 425 of this chapter, a position, compensated or voluntary, in a covered child or youth services provider agency with duties and responsibilities that would require the employee or volunteer to provide direct services that affect the health, safety, and welfare of children or youth or services for the benefit of children or youth, including but not limited to the duties and responsibilities listed in section 416 of this chapter.

Criminal background check – the investigation of a person's criminal history through the record systems of the FBI or MPD.

Days – calendar days, unless otherwise indicated.

Independent agency – any board or commission of the District of Columbia government not subject to the administrative control of the Mayor.

Material – a statement that is capable of influencing, or has a natural tendency to affect, an official decision.

Non-covered duties and responsibilities – for the purposes of sections 412 through 425 of this chapter, duties and responsibilities of a volunteer in a covered child or youth services provider agency of such a nature that would not require that the volunteer be subjected to the criminal background check and traffic records check requirements of the Act.

Non-covered position – for the purposes of sections 412 through 425 of this chapter, a position, compensated or voluntary, in a child or youth services provider agency with duties and responsibilities of such a nature that would not require that the employee or volunteer be subjected to the criminal background check and traffic records check requirements of the Act.

Person being considered for employment – for the purposes of sections 412 through 425 of this chapter, a person who has been made a tentative offer of employment, compensated or voluntary, to a covered position, subject to the satisfactory completion of a criminal background check or a traffic record check, or both.

Volunteer – for the purposes of sections 412 through 425 of this chapter, any person who performs work without any monetary or other financial compensation, in a covered position, for a child or youth services provider agency; or an employee of the District government who volunteers his or her services as a host of a child or youth participating in the Summer Youth Employment Program within his or her agency.

Youth – for the purposes of sections 412 through 425 of this chapter, persons between thirteen (13) and seventeen (17) years of age, inclusive.

Comments on these proposed regulations should be submitted, in writing, to Brender L. Gregory, Director, D.C. Department of Human Resources, at 441 4th Street, N.W., Suite 300S, Washington, D.C. 20001, within thirty (30) days of the date of publication of this notice in the *D.C. Register*. Additional copies of these proposed regulations are available from the above address.